Federal Court  Cour fédérale

Date: 20110927

Docket: IMM-1667-11

Citation: 2011 FC 1108

Ottawa, Ontario, September 27, 2011

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

YANJUN DONG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by a Visa Officer to refuse to reopen and reprocess Ms. Dong's application for permanent residence in Canada. That application was initially granted. However, the permanent resident visa that was issued to her was cancelled on the basis that she had failed to disclose her recent marriage.

[2] Ms. Dong submits that the Visa Officer's decision was unreasonable and that she was denied procedural fairness because (i) she was not provided "an opportunity to present her side of the story," (ii) the Visa Officer failed to consider some of her evidence in reaching her decision, and

(iii) the interpreter who assisted with her point-of-entry interview was not fully competent in Mandarin.

[3] For the reasons that follow, the application is dismissed.

I. Background

[4] On October 16, 2008, Ms. Dong applied for permanent residence for herself and her daughter under the Prince Edward Island Provincial Nominee Program ("PEI PNP"). In her application documents, she indicated that she was divorced. On April 16, 2010, the consulate in Hong Kong (the "Consulate") processed her application and informed her in writing that she and her daughter would be issued permanent resident visas.

[5] On May 19, 2010, Ms. Dong married Mr. Long Yang. One week later, on May 26, 2010, she received visas for herself and her daughter. At no time prior to her arrival in Canada on October 26, 2010 did she inform the Consulate of her marriage to Mr. Long.

[6] On September 24, 2010, Mr. Long applied for a temporary resident visa ("TRV") at the Canadian Embassy in Beijing, in order to help with his wife's landing. In his application, he declared that he had married Ms. Dong on May 19, 2010. His application was denied on the basis that he was considered unlikely to leave Canada after his authorized stay.

[7] Upon her arrival with her daughter at Pearson International Airport in Toronto, Ms. Dong was questioned by a Canada Border Services Officer ("CBS Officer"). As a result of that questioning, concerns arose regarding (i) the fact that she had not previously disclosed her marriage to Mr. Long, and (ii) whether she intended to settle in Prince Edward Island ("PEI"), as opposed to

Vancouver. Due to those concerns, Ms. Dong was requested to report for further examination, to be held the following day.

[8] However, rather than have a hearing before the Immigration Division, Ms. Dong voluntarily withdrew her application to enter Canada and agreed to leave Canada without delay. She departed for Hong Kong later that day.

[9] On November 2, 2010, Ms. Dong's former immigration agent sent an e-mail to the Visa Officer requesting her to reconsider her decision. On that same date, the Consulate received a letter, dated October 29, 2010, in which Ms. Dong apologized for her "negligence" and requested an opportunity to "submit materials of her spouse." According to Ms. Dong, she did not sign that letter and she was not aware of it before it was sent by her former immigration agent.

[10] On November 3, 2010 the Visa Officer wrote a letter (the "November Letter") to Ms. Dong advising her that her application would not be reopened and reprocessed, because she had failed to report her marriage to Mr. Long, notwithstanding that she had previously been clearly instructed to report any changes in her marital status before collecting her visa. The Visa Officer proceeded to note that had the Consulate been informed, prior to the issuance of her visa, that she had married Mr. Long, she would have been informed of additional requirements that she had to meet as a result of that marriage. The Visa Officer added that, as matters stood, she did not meet the requirements of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations") and the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "IRPA"), because she has a family member who had not been examined and found to be not inadmissible to Canada. Accordingly, she was informed that the permanent residence visa that had been issued to her had been cancelled.

[11] On January 31, 2011, Ms. Dong's new representative, Mr. Jean-François Harvey, wrote to the Immigration Program Manager at the Consulate to submit that Ms. Dong's "rights to land in Canada should be reinstated" (the "Harvey Letter").

II. The "Decision" under Review

[12] In a letter dated January 31, 2011 (the "January Letter"), the Visa Officer informed Mr. Harvey and Ms. Dong that Ms. Dong's application would not be reopened and reprocessed. After proceeding to provide a brief summary of the history of that application, the Visa Officer reiterated that the Consulate would not reopen and reprocess the application.

III. Issues

1. Was Ms. Dong late in filing her application for judicial review?

2. Was the Visa Officer's "decision" unreasonable?

3. Were Ms. Dong's procedural fairness rights breached?

IV. Standard of Review

[13] The issue of whether Ms. Dong was late in filing her application for judicial review turns on whether the January Letter constituted a "decision". In my view, that is a question of law that is reviewable on a standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 55; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 44).

[14] The second issue is a question of mixed fact and law that is reviewable on a standard of reasonableness. In short, the Board's determination will stand so long as it falls "within the range of

possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para 47), provided that "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility" (*Khosa*, above, at para 59).

[15] The third issue, concerning Ms. Dong's procedural fairness rights, is reviewable on a standard of correctness (*Dunsmuir*, above, at paras 79, 87; *Khosa*, above, at para 43).

V. Analysis

A. *Was Ms. Dong late in filing her application for judicial review?*

[16] The Respondent submits that the January Letter did not constitute a "decision," and therefore is not subject to review by this Court. In short, the Respondent maintains that the January Letter was simply a "courtesy letter" which responded to the Harvey Letter. The Respondent asserts that the January Letter simply (i) explained that Ms. Dong's request to reopen and reprocess her application had already been denied on November 3, 2010, and (ii) restated what Ms. Dong had previously been told in the November Letter.

[17] Ms. Dong submits that the January Letter "effectively refuse[d] the request to reopen the file" and "clearly discuss[ed] new points" that were raised in the Harvey Letter. In this regard, Ms. Dong refers to the representations made by Mr. Harvey that (i) Ms. Dong had "duly declared her new husband" in the application that was made for Mr. Long's TRV, and (ii) the Visa Officer had "seemed to be duly aware of this fact." Ms. Dong also notes that, in her Statutory Declaration dated, November 3, 2010, she provided a full history of her husband's TRV application and asserts that she and her husband "never tried to hide any facts from the immigration authorities." In addition, Ms. Dong notes that, in the Visa Officer's cover letter to the Registry of this Court attaching a copy of the January Letter, she described the January Letter as a "decision."

[18] I disagree with Ms. Dong's submission on this issue.

[19] The fact that the Visa Officer may have characterized the January Letter as a decision is not determinative of whether it was in fact a decision that is subject to review by this Court. What is determinative is whether there was a "fresh exercise of discretion" by the Visa Officer (*Choudhary v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ 843, at paras 15-16; *Brar v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ 1527, at para 8). Moreover, if Mr. Harvey's letter is properly characterized as requesting a reinstatement of Ms. Dong's "rights to land in Canada," it is necessary to consider whether the Visa Officer had the jurisdiction to make a decision concerning the reinstatement of those rights (*Choudhary*, above).

[20] I am satisfied that it is clear from the face of the January Letter that it did not address any new arguments or evidence that had not previously been considered by the Visa Officer. Stated alternatively, there was nothing in the January Letter which might in any way reflect that the Visa Officer had exercised new discretion in response to any new submissions made by Ms. Dong.

[21] In her initial written submissions, Ms. Dong stated that "the only justification provided [for refusing to reopen her file] was that the file had already been closed." However, at the hearing on this application, Ms. Dong's counsel submitted that the January Letter addressed "new" submissions that were made in the Harvey Letter. Specifically, it was submitted that the following passage, which appeared at the very end of the January Letter, addressed arguments or evidence that had not previously been considered by the Visa Officer:

> […] Your evidence is that you married on 19 May 2010. You failed to inform this office of change [*sic*] to your family composition as you were repeatedly instructed to do in our correspondence (visa

> pickup letter, and letter accompanying your permanent resident visas). Your statement that you informed this office of change [*sic*] in your marital status is untrue. Moreover, your new husband indicating on his TRV application submitted to Beijing that he married you is not you informing this office of change to your material [*sic*] status.

[22] The notes entered by the Visa Officer into the Computer-Assisted Immigration Processing System ("CAIPS") used by Citizenship and Immigration Canada for processing applications made outside Canada stated that Ms. Dong had been refused landing on two grounds: (i) the fact that she is married and did not inform the Consulate of her changing marriage status, and (ii) the fact that it had been determined that she was not intending to reside in Prince Edward Island ("PEI"). The CAIPS notes then stated "SEE FULL EMAIL FOR ENTIRE STORY OF APP'S ENCOUNTER WITH [CBS] OFFICER POWELL."

[23] Among other things, the CBS Officer's e-mail to the Visa Officer stated the following with respect to the issue of Ms. Dong's marriage to Mr. Long:

> Mrs. Dong confirms that, contrary to written instructions which she was provided with, she failed to notify your office of her change in marital status. She initially stated that she was not aware of this requirement; however, she has in her possession the written instructions provided by your office, clearly outlining that any change in marital status MUST be disclosed. She then stated that her immigration consultant had not told her of this requirement. She responds that yes, she is an adult who knows how to read and write. She confirms that she is educated, stating that she has a university degree.
>
> ….
>
> It should also be noted that when first questioned about her failure to disclose her changed marital status, Mrs. Dong responded that it was because she was not going to sponsor her new husband. She was then asked if it was her intention to live in a new country without her husband. She later responded that she was advised by the immigration consultant that she should wait until she was landed and then sponsor her husband at a later date.

[24] In addition to the foregoing, Ms. Dong's letter to the Consulate dated November 2, 2010 states that she was surprised when the CBS Officer indicated that she (the CBS Officer) had not been notified of her change in marital status. The implication is that she was surprised because her marriage to Mr. Long had been disclosed in his TRV application.

[25] Based on the foregoing, I am satisfied that the passage from the January Letter which Ms. Dong attempts to construe as addressing new arguments did not in fact address any "new" arguments. My conclusion on this point is reinforced by the fact that the passage from the January Letter, referenced above at paragraph 21, appeared at the very end of that letter, after the Visa Officer stated that Ms. Dong's application would not be reopened or reprocessed.

[26] In summary, the January Letter did not contain any "decision" that could be the subject of review by this Court.

[27] In addition to the foregoing, I am satisfied that the Harvey Letter clearly requested a reinstatement of Ms. Dong's rights to land, rather than a reconsideration and reopening of her visa application. As such, the Visa Officer, who exercises authority delegated from the Minister of Citizenship and Immigration, had no jurisdiction to make any determination in respect of that request. As noted above, the decision to deny landing rights to Ms. Dong was made by the CBS Officer, who exercises authority delegated from the Minister of Public Safety and Emergency Preparedness (*Choudhary*, above).

[28] Moreover, the appropriate time to challenge the CBS Officer's decision to deny landing rights to Ms. Dong and her daughter was prior to their departure from Canada. However, rather than

undertake such a challenge, and after being advised of her right to attend a further examination before the Immigration Board on October 27, 2010, Ms. Dong explicitly declined to exercise such right and voluntarily decided to return to Hong Kong later that same day.

[29] Accordingly, the only "decisions" that were left for Ms. Dong to challenge were the decisions in the Visa Officer's November Letter to (i) refuse to reopen and reprocess her application for permanent residence, and (ii) revoke her permanent resident visa. Unfortunately, Ms. Dong did not challenge that decision nor request an extension of time in which to do so.

[30] The decision in *Marr v Canada (Minister of Citizenship and Immigration)*, 2011 FC 367, at para 56, is distinguishable. In *Marr*, the applicant sought to review the Visa Officer's original decision to deny him a skilled worker visa on the basis that he had not provided a letter to support his educational background. The applicant immediately sent the missing documentation and asked to have his application reconsidered. After the Visa Officer refused, the applicant sought review of the Visa Officer's decision before the filing deadline. By contrast in the present case, the Applicant was refused for failing to report at any time prior to her entry into Canada, information that had previously been requested. While she claims to have submitted materially new information after the Visa Officer refused to reopen her application, I am satisfied that she did not do so.

[31] It follows from all the foregoing that this application for judicial review must be dismissed.

[32] Given my finding on this point, it is not strictly necessary to review Ms. Dong's remaining submissions. However, given the nature of those submissions I feel that it would be appropriate to do so.

B. *Was the Visa Officer's "decision" unreasonable?*

[33] In the Harvey letter and in her initial submissions, Ms. Dong stated that she had provided proper notification of her change in marital status through her husband's TRV application. However, in her subsequent submissions she acknowledged that it was her husband who completed and submitted that application. That said, she then asserted that her failure to properly report the change in her marital status was attributable to a misunderstanding and that she never had any intention to deceive the Visa Officer or anyone else at the Consulate. She further claimed that the CBS Officer already knew of the change in her marital status at the time of her point-of-entry interview upon landing in Toronto on October 26, 2010. Now, she also relies on the principle of the indivisibility of the Crown to state that the Consulate was effectively notified of the change in her marital status when her husband submitted his TRV application. In this context, she maintains that the Visa Officer's decision to refuse to reopen and reconsider her application was not reasonable.

[34] I disagree.

[35] As reflected in the quote reproduced at paragraph 23 above, Ms. Dong gave at least three different explanations for her failure to disclose the change in her marital status, in accordance with the instructions that previously had been given to her. She subsequently provided a fourth explanation, namely, that she thought the required notice had been provided when her husband submitted his TRV application.

[36] In her e-mail to the Visa Officer, the CBS Officer characterized Ms. Dong as having had a "propensity to respond that she didn't know" and as being "evasive" and generally "lacking in credibility" during her point-of-entry interview.

[37] In this context, I am satisfied that the Visa Officer's decision not to reopen and reconsider Ms. Dong's application for permanent resident status was well within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above). As discussed in the next section below, Ms. Dong was repeatedly informed of her obligation to report any change in her marital status. She was also specifically informed that she had an obligation to report such change to the Consulate in Hong Kong. She must now bear the consequences of having failed to do so.

C. *Were Ms. Dong's procedural fairness rights breached?*

[38] Ms. Dong submits that the Visa Officer should have sent her a "fairness letter" to provide her with an opportunity to specifically address the issue of the change in her marital status. In this regard, she asserts that "there are 'reasonable' or 'legitimate expectations' that an application should be treated fairly, especially when the consequences is [*sic*] of such importance for the applicant." She further claims that "it appears likely that the submissions of Mr. Harvey and the detailed solemn declaration of the applicant enclosed with it were not even considered at all since the reply thereto was simply that a decision had already been made."

[39] I am satisfied that Ms. Dong's procedural fairness rights were not breached by the manner in which she was treated by the Visa Officer and by the CBS Officer.

[40] The content of the duty of fairness owed to visa applicants is at the low end of the spectrum (*Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297, at para 41 (CA); *Khan v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345, at paras 30-32; *Patel v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 55, at para 10).

[41] On August 27, 2008, a letter was sent to Ms. Dong advising her that she had been selected as a PEI Provincial Nominee. Among other things, that letter stated:

> It is important that you keep us informed … If there is any change to your family status, ie death, birth or marriage, it is very important that you advise us and Citizenship and Immigration Canada immediately. Failure to do so could result in your permanent residency being refused or revoked. Upon issuance of the visa, please let us know when you intend to relocate to Prince Edward Island.

[42] The visa "pick up" letter that was sent to Ms. Dong on April 16, 2010 stated:

> You must report to this office in writing any changes in your travel documents, family configuration and marital status *before* collecting your visa(s) or submitting your passport(s). This includes all births, deaths, marriages, divorces, new custody arrangements and adoptions involving you and/or your dependents. Changes could result in the necessity of filing a new application and fee, and sponsorship if applicable. (Emphasis added.)

[43] It is very clear from this second letter that any change in Ms. Dong's marital status had to be reported to the Consulate in Hong Kong, as opposed to any other office of the Crown.

[44] On May 26, 2010, the visas for Ms. Dong and her daughter were issued with instructions. The instructions letter of the same date issued by the Consulate provided the following warning:

> Your visa is valid only if all family members (spouse, common-law partner, dependent son or daughter) has been declared and examined. You are required to inform us of any change to your family composition prior to picking up the visas. Failure to have declared any family member may prevent you from becoming a permanent resident in Canada. You must inform us of any change in your marital status or in your family composition (marriage, common-law relationship, separation, divorce, birth of a child, adoption, death, etc.) BEFORE you leave for Canada. We will let you know if there are further procedures required. (Emphasis added.)

[45] I am satisfied that, in this case, the duty of fairness owed to Ms. Dong was more than met when (i) she was provided with a full opportunity to present evidence relevant to her case to the Visa Officer, (ii) she was warned several times, in very clear terms, of the consequences that would flow from failing to notify the Consulate of any changes in her marital status, (iii) she was provided with an opportunity, in her port-of-entry interview, to address the issue of whether she had provided proper notice of the change in that status, and (iv) her evidence was fully and fairly considered by the Visa Officer. Ms. Dong was also provided with appropriately justified, transparent and intelligible reasons explaining why her application would not be reopened and reconsidered.

[46] In my view, once a visa applicant has been clearly advised in writing of the consequences of failing to do something, the applicant's procedural fairness rights do not extend so far as to require a visa officer to issue a "fairness letter" or to provide the applicant with any other opportunity to explain why he or she failed to do what he or she was clearly instructed to do. Accordingly, the Visa Officer in the case at bar had no obligation to send a fairness letter, or to otherwise provide additional opportunities to Ms. Dong to address the issue of whether she had provided proper notice of the change in her marital status.

[47] It appears from the record that the CBS Officer became aware of Ms. Dong's marriage to Mr. Long during her point-of-entry interview. However, even if she had previous knowledge of the marriage, the fact remains that Ms. Dong failed to comply with the clear instructions that she was given to report her change in marital status to the Consulate in Hong Kong. The fact that her husband may have disclosed the marriage in his TRV application was not sufficient to discharge the onus on Ms. Dong to report that change in her marital status herself, to the Consulate.

[48] Ms. Dong submits that the Visa Officer "did not consider or weigh the possibility of good faith error here." However, there is nothing in the record to suggest that the Visa Officer did not consider the various explanations given by Ms. Dong for failing to notify the Consulate of the change in her marital status. The CBS Officer immediately reported to the Visa Officer the inconsistent explanations that Ms. Dong gave during her port-of-entry interview. Ms. Dong's former immigration agent then submitted a letter dated November 2, 2010 which further explained Ms. Dong's position that she had never intended to conceal her marriage to Mr. Long. Particularly given the inconsistent explanations provided by Ms. Dong, it was open to the Visa Officer to refuse to reopen and reprocess her application, without specifically addressing those various explanations either in her November Letter or in her other correspondence with Ms. Dong.

[49] Ms. Dong further submits that the interpreter who assisted with her point-of-entry interview was not fully competent in Mandarin. In this regard, she maintains that there was "no assertion that the person is duly accredited for that language but only that the person believes he or she faithfully provided that interpretation."

[50] However, the following passage from the CBS Officer's reporting note to the Visa Officer makes it very clear that Ms. Dong fully understood what had been communicated throughout her point-of-entry interview:

> An accredited Mandarin interpreter was utilized during the examination to ensure that there were no misunderstandings. Given Mrs. Dong's propensity to respond to she didn't know, and that no one had told her, along with her evasiveness (changing the topic, partial answers, misrepresentations, etc), she was counseled that she is lacking in credibility thereby casting doubt on the veracity of any further statements made by her. Hence, to ensure complete understanding, she was asked to repeat what had been said and asked to provide in her own words what she understood to be

> communicated throughout the examination. It was determined that Mrs. Dong left this office with a full and complete understanding of the concerns, the effects of A23 release to report and consequences for failure to comply, the effects of being allowed to leave, and the requirement to contact your office for further direction. She has been advised that the respective CPRs will be returned directly to your office and not returned to her.

[51] Finally, Ms. Dong asserts that "to reject a well-qualified applicant out of hand due to a simple misunderstanding on her part goes against the overall goals of the immigration policy and the needs of Canadian society."

[52] I disagree.

[53] Given the clear and unambiguous instructions that were given to Ms. Dong regarding her obligation to report any change in her marital status to the Consulate, her failure to do so cannot be characterized as a simple misunderstanding. Indeed, the evidentiary record belies this claim.

[54] Ms. Dong's failure to report her marriage to Mr. Long was inconsistent not only with the clear instructions that were repeatedly given to her, but also with her "duty of candour," which requires foreign nationals seeking to enter Canada to disclose material facts that may have a bearing on their application for permanent residence (*Haque v Canada (Minister of Citizenship and Immigration)*, 2011 FC 315, at para 13). Her omission was serious, as it could have induced an important error in the administration of the IRPA. In short, her undisclosed marriage resulted in her having a new family member who had not been examined and found to be not inadmissible to Canada.

[55] As to the overall goals of Canada's immigration policy and the needs of Canadian society, I endorse the following comments of my colleague Justice Mosley, in *Haque*, above:

> 14 Section 3 of the IRPA points to a number of immigration objectives that should be kept in mind when administering the *Act*. Among others, these objectives include enriching and developing the country through social, economic and cultural means while ensuring the protection and security of Canadians living here. In order to adequately protect Canada's borders, determining admissibility necessarily rests in large part on the ability of immigration officers to verify the information applicants submit in their applications. The omission or misrepresentation of information risks inducing an error in the *Act*'s administration.

[56] Gaining entry into Canada through misrepresentation or omission undermines the integrity of Canada's immigration system (*Canada (Minister of Citizenship and Immigration) v Niaz*, 2009 CarswellNat 5411, at para 30). It also undermines the credibility of that system. The same is true when individuals gain permanent resident status, or citizenship, in contravention of their duty of candour.

[57] When tolerated, such conduct represents a threat to our immigration system, and an injustice to those who "play by the rules." There must therefore be a low tolerance for such conduct (*Niaz*, above, at para 40).

[58] A low tolerance for such conduct is also warranted in light of the significant backlog in the number of people who are seeking to become permanent residents or citizens of Canada, in accordance with the rules. The legitimate interests of administrative efficiency and fairness to those who "play by the rules" dictate that those who fail to do so should suffer the consequences, without being given additional opportunities to explain their failure, and thereby impose a further burden on our generous immigration system.

[59] Even if the CBS Officer knew, at the time of Ms. Dong's point-of-entry interview, that

Mr. Long had disclosed his marriage to Ms. Dong that would not cure Ms. Dong's failure to notify that change in her marital status to the Consulate, as she was instructed to do. It is not open to applicants for permanent residence to attempt to justify a failure to report information that they are required to report, by stating that immigration authorities became aware of that information in other ways, or could easily discover that information through other means.

VI. Conclusion

[60] The application for judicial review is dismissed. There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT this application for judicial review is dismissed.

"Paul S. Crampton"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Stephen J. Fogarty	FOR THE APPLICANT
Michelle Joubert	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fogarty Law Firm Montreal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT