Federal Court Cour fédérale

**Date: 20191120**

**Docket: IMM-717-19**

**Citation: 2019 FC 1468**

**Toronto, Ontario, November 20, 2019**

**PRESENT: Mr. Justice Diner**

**BETWEEN:**

**JIAN PING ZHANG**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] This application judicially reviews a decision dismissing the Applicant's appeal of the refusal of his second spousal sponsorship application. In it, the Immigration Appeal Division [IAD] applied the doctrine of *res judicata* because the same issue had been determined when the Applicant submitted his first spousal sponsorship application in 2012. I find the IAD decision to be reasonable, and thus am dismissing the application for judicial review.

[2] By way of a brief background, Mr. Zhang was born in China. There, he met his ex-wife, a Canadian, in 2002. Following their marriage in 2005, she sponsored him for Canadian permanent residence and Mr. Zhang then landed in Canada in October 2006. They divorced in June 2008.

[3] Mr. Zhang met his current wife in China in 2002 and began dating the next year. He states that the relationship ended in 2004, at which point she informed him that she was pregnant with his child. He did not believe her, and they broke off communication. She gave birth to their first daughter in 2005. Mr. Zhang claims he was unaware of the existence of his daughter until a mutual acquaintance informed him of her birth in 2008. The relationship with his current wife was rekindled shortly thereafter. The couple married later that year. They had a second daughter in 2011.

[4] Mr. Zhang first sought to sponsor his current wife from China in 2009. That application was refused by a visa officer. They unsuccessfully appealed whereby the IAD [2012 Decision] held that under section 4.1 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, the first marriage was dissolved primarily so that his current wife could acquire a status or privilege under Canada's immigration system. Mr. Zhang did not seek judicial review of that decision.

[5] In 2016, 10 months after acquiring Canadian citizenship, Mr. Zhang submitted a second application to sponsor his current wife. The following year, that second application was again refused by a visa officer. Mr. Zhang unsuccessfully appealed to the IAD, but this time around he sought judicial review of the decision [2018 Decision] – the subject of these reasons.

[6] Prior to issuing its 2018 Decision, the IAD asked the parties, as a pre-hearing step, to provide written submissions addressing the issue of *res judicata*. This turned out to be the decisive issue, because the IAD concluded that it had indeed already finally decided the matter in the 2012 Decision. It therefore lacked jurisdiction to hear the appeal anew. In its 2018 Decision, the IAD outlined the three preconditions for finding that issue estoppel – the relevant branch of the *res judicata* doctrine – applied, and found that all three issue estoppel preconditions were satisfied.

[7] The IAD went on to consider its discretion to exempt Mr. Zhang from *res judicata* – namely whether any special circumstances warranted not applying the doctrine. In particular, Mr. Zhang argued that he had presented decisive, new evidence in the form of a statutory declaration made by his ex-wife supporting his version of the events surrounding the marriage breakdown and second sponsorship. The IAD disagreed, finding that the statutory declaration only partially supported his "changed" testimony at the 2012 IAD hearing, and failed to corroborate significant credibility-related issues. Consequently, the 2018 Decision deemed this declaration not to be new or decisive evidence capable of overcoming earlier findings on Mr. Zhang's credibility.

[8] The 2018 Decision also addressed three issues raised by Mr. Zhang regarding natural justice breaches he alleges occurred at the second visa office interview in 2017. The IAD determined that the issues had already been addressed in the 2012 Decision, noting its finality as Mr. Zhang failed to seek judicial review. The IAD felt it would be contrary to the public interest to allow the appeal to move forward.

## II. Analysis

[9] *Res judicata* developed as a way of ensuring finality to litigation, and its issue estoppel branch precludes parties from relitigating issues decided in a prior proceeding. It comprises two steps. First, *res judicata* applies if three criteria are met, namely (1) the same question has previously been decided, (2) the prior judicial decision was final, and (3) the parties to both the prior and current proceeding are the same (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 25 [*Danyluk*]).

[10] Second, even if the criteria are met, the decision-maker can exercise her discretion not to apply *res judicata* where an injustice would ensue (*Danyluk* at paras 33, 62-67 and 80). For this second, discretionary step of the analysis, the decision-maker determines whether any special circumstances exist such that issue estoppel ought not to apply (*Tuccaro v Canada*, 2016 FCA 259 at para 30) and where relitigation would enhance, rather than impeach, the integrity of the judicial system (*Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 52). New evidence – being evidence that could not have been discovered by the exercise of reasonable diligence in the previous proceeding – can constitute "special circumstances." However, the bar is high for the second step (positive discretion) to be applied — the evidence must be "practically conclusive of the matter" (*Vo v Canada (Citizenship and Immigration)*, 2018 FC 230 at para 27 [*Vo*]). Another way that one could meet the "special circumstances" of the second step of the issue estoppel test would be for serious breaches of natural justice (*Danyluk* at paras 75-76), such as fraud or misconduct in the proceeding under review (*Punia v Canada (Citizenship and Immigration)*, 2013 FC 1078 at para 8; *Vo* at paras 16-17).

[11] In this judicial review, Mr. Zhang challenges the 2018 Decision on two grounds, namely that the IAD (i) should have exercised its discretion to allow the hearing to proceed despite *res judicata* based on the new evidence (i.e., the second stage of issue estoppel), and (ii) erred in its assessment of the alleged natural justice issues at the 2017 visa office interview. I agree with the parties that both issues should be reviewed under a reasonableness standard (*Vo* at para 12), recognizing that Mr. Zhang only challenges the second step of issue estoppel before this Court, and there is case law holding that the first step of issue estoppel may be reviewed on different standard (see *Chotai v Canada (Citizenship and Immigration)*, 2015 FC 1335 at para 15 [*Chotai*]).

[12] Here, the IAD reasonably found that Mr. Zhang's (i) new evidence and (ii) natural justice arguments did not justify exercising discretion to overcome its issue estoppel assessment. Beginning with the first, the panel justifiably found that the ex-wife's statutory declaration was not decisive new evidence. Rather, the very short statement simply provided a timeline of their relationship, primarily confirming that the couple began living together in October 2006 but separated in January 2007 due to incompatibility, and that she returned to Hong Kong where she now has a family. Mr. Zhang submits that it was an error to reject this declaration without considering its weight or credibility, given that its author has never been found untruthful. Counsel stated that this evidence went to the very heart of the 2012 Decision.

[13] I disagree. The 2012 Decision was largely based on the various changes and inconsistencies that arose from the couple's testimony, including regarding the cause and timing of their breakup. The 2018 Decision found that the statutory declaration only partially supported

Mr. Zhang's changed testimony, and was thus insufficient to overcome credibility concerns. In essence, the IAD found that, if believed, the declaration was insufficient to patch up the numerous remaining holes in Mr. Zhang's story.

[14] This was a reasonable conclusion for the IAD to reach in the circumstances. The question that must be answered is whether the new evidence is sufficient to address and materially change the original decision (*Chotai* at para 21). The IAD justifiably found that the statutory declaration did not do so. The declaration comprises a mere nine sentences, which the IAD wrote that, together, provide "little in the way of insight into the relationship outside facts such as their first meeting, the date of marriage and length of cohabitation in Canada." Ultimately, the facts asserted in the declaration, even if true, do not prove that the first marriage was genuine. It was open to the IAD to find the declaration falls short of the high threshold for new evidence.

[15] Mr. Zhang's second issue asserts that the IAD also acted unreasonably in overlooking natural justice issues that occurred at the preceding 2017 visa office interview. There are two problems with this argument.

[16] First and foremost, the IAD's 2018 Decision is being reviewed today, not the 2017 visa officer decision. Certainly, natural justice breaches with the IAD process would give rise to a basis to intervene. Indeed, the fact that the Applicant asks me to examine the 2018 Decision for its review of a natural justice breach means that the alleged breach is "once removed," and thus why the reasonableness standard applies in this particular situation. Viewed another way, if the

Court were being asked to review a natural justice breach alleged in the proceeding immediately below, the correctness standard would apply.

[17] Second, to find a basis for issue estoppel due to fraud or misconduct at the IAD, one would have to look to the 2012 Decision. Neither is alleged, nor present. Rather, Mr. Zhang contends that the IAD erred in its 2018 Decision when it focused on the 2012 Decision and how it had reviewed the interview at the visa office, but the issues arose at the visa office in 2017. However, as conceded by counsel, that is a circular argument, because to get to that point, one would have to overcome the issue estoppel on either the first or second branches of the test enumerated above. And that did not occur in this situation.

[18] In conclusion, whether Mr. Zhang's wife qualifies as a "spouse" was previously litigated and finally decided by the IAD in the 2012 Decision. The time to seek judicial review of that decision was then. The Applicant should have put his best foot forward at that time, not six years later. The IAD decided that the Applicant failed to meet the "decisive" fresh evidence standard to overcome the earlier findings. I agree that the declaration did not meet the necessary threshold. The IAD's assessment of *res judicata* in the 2018 Decision was justified and transparent, falling well within the range of reasonable outcomes, and I accordingly dismiss the judicial review.

**JUDGMENT in IMM-717-19**

**THIS COURT'S JUDGMENT is that**:

1. This application for judicial review is dismissed.

2. No questions for certification were argued, and I agree none arise.

3. There is no award as to costs.

"Alan S. Diner"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-717-19 |
| **STYLE OF CAUSE:** | JIAN PING ZHANG V THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | NOVEMBER 8, 2019 |
| **JUDGMENT AND REASONS:** | DINER J. |
| **DATED:** | NOVEMBER 20, 2019 |

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