

Date: 20081016

Docket: IMM-1604-08

Citation: 2008 FC 1172

Toronto, Ontario, October 16, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant

and

KEUN SUP JIN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Theirs is not a marriage made in heaven. It was a bargain: he wanted a son and heir, she wanted status in Canada. Notwithstanding their worldly interests, the Immigration Appeal Division decided that the marriage was genuine. For the reasons that follow, I dismiss the Minister's application to quash that decision.

Background

[2] Mr. Jin is 73. He was born in Korea but resides in Canada. He is a citizen of both countries. He testified that his first marriage to Jeong Soon Han, which lasted nearly 40 years, was arranged by

their parents. They married in 1961 and apparently had two children, a son and a daughter. Mr. Jin and his daughter are estranged. His son, Bong Ho Jin, committed suicide in 1993, at the age of 30. Mr. Jin, wanting an heir, suggested to his wife that they adopt a son. She refused, precipitating their separation. They were formally divorced in 2000.

[3] Mr. Jin says that he first met his second wife, Chun Ox Kim, at a boarding house in Toronto in April 1998. They were both living there; Mr. Jin because his marriage to his first wife had broken down, and Ms. Kim because she was looking to live permanently in North America. Within a week of their meeting, they were discussing marriage and the fact that Mr. Jin wished to have a son. They were eventually married in March 2001, during a trip Ms. Kim made to Canada.

[4] Ms. Kim is 25 years younger than Mr. Jin and she has an interesting past. She was born in China, which is where she married her first husband. She says that this was a marriage arranged by her family. They divorced in May 1995, but there was a daughter born of this marriage. Initially, the father was granted custody of the daughter, but that was changed in 2000, after Ms. Kim met Mr. Jin. Since then, Ms. Kim has had custody of her daughter, who now attends university in Korea.

[5] Ms. Kim married her second husband, Jaeyeol Cho, in November 1995. She says that this marriage was arranged by a business associate of her father. Mr. Cho is a Korean national. The panel found that at least one of her reasons for marrying Mr. Cho was to gain admission to Korea. This marriage soon broke down. The marriage ended in divorce - the first time - in May 1999.

[6] Following her separation from Mr. Cho, Ms. Kim paid a smuggler to bring her into the United States in 1998, in the hope of earning some money there. She was apparently taken as far as Mexico, but came to view the arrangement as a scam and felt that she was putting herself at risk trying to cross the Mexico-U.S. border. She then decided to come to Canada, where she could gain entry without a visa. At the Toronto boarding house where she ended up, she met Mr. Jin and their bargain was struck and she returned to Korea.

[7] Ms. Kim remarried Mr. Cho in November 2000 for the sole purpose of facilitating an adoption of an infant boy, Seung Joon Jin, who was later registered in Korea as the son of Mr. Jin and Ms. Kim. Ms. Kim and Mr. Cho divorced - the second time - in January 2001.

[8] Mr. Jin's first application to sponsor his wife's entry into Canada as a permanent resident was refused in January 2002. Mr. Jin withdrew his appeal of that decision in November 2002. The panel found that the withdrawal of that application may have been partially motivated because it included Ms. Kim's daughter, who had health problems. She is not listed on the second application which lies at the base of this application for review.

[9] The second application for permanent residency was also refused by an officer. However, an appeal to the IAD was allowed by decision dated March 6, 2008. The panel found that the marriage had been entered into in order for Ms. Kim to be able to gain entry into Canada; however,

it also found that their seven year marriage was genuine, and thus was not caught by section 4 of the *Immigration and Refugee Protection Regulations*, SOR 2002-227, which provides as follows:

4. For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.

4. Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait, le partenaire conjugal ou l'enfant adoptif d'une personne si le mariage, la relation des conjoints de fait ou des partenaires conjugaux ou l'adoption n'est pas authentique et vise principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi.

Issues

[10] The Minister, the applicant in this review, submits that there are two issues for decision on this application:

- (a) Whether, in finding that the marriage was genuine, the IAD misinterpreted section 4 of the Regulations; and
- (b) Whether the IAD failed to assess the credibility of the witnesses, or made findings of fact that were perverse or capricious.

Did the panel err in interpreting section 4 of the Regulations?

[11] The Minister submits that the panel erred in law by misinterpreting the Regulations. The panel found that Mr. Jin and Ms. Kim had entered into a type of *quid pro quo* marriage. His

purpose was to have a son and heir and her purpose was to obtain status in Canada. The Minister submits that the panel effectively found that because these parties had maintained and pursued the purpose of obtaining status for her in Canada, a genuine marriage existed between them. It is submitted that such an interpretation disregards the intent of section 4, which is to protect the integrity of Canada's immigration system.

[12] If the panel had found that this marriage was genuine on the sole basis that for seven years, the couple had maintained and pursued the purpose of gaining status in Canada for Ms. Kim, I would agree with the Minister. However, the panel had other reasons for finding as it did.

[13] Although the panel found that each party had benefited from the relationship – he gained a son and she gained financial security – it was satisfied that Ms. Kim “will continue in her relationship with [Mr. Jin] and is not likely to abandon the marriage if she were to gain admission to Canada, or even if she does not” (emphasis added). The panel reached this conclusion based on its findings that: (a) they have been married for 7 years, (b) they have adopted a child, (c) they have seen each other regularly, (d) Mr. Jin has provided Ms. Kim with significant financial support, and (e) they first made efforts to have a child of their own, then arranged an adoption - she having to remarry her former spouse to this end - and were eventually married in Canada, after which they registered the adoptive son as their own in Korea. As the panel put it, “if the marriage continues with the appellant and applicant in an ongoing relationship it is, in effect, a genuine marriage”. The panel, on the evidence, concluded that the marriage would continue.

[14] As was noted by Justice Hughes in *Khan v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1875, 2006 FC 1490, at para. 14, “genuineness is revealed by a shared relationship of some permanence, interdependence, shared responsibilities and a serious commitment.” In my view, that is the correct standard and is the standard against which the panel judged this marriage. It did not misinterpret or misapply the Regulation.

Did the panel err in failing to assess credibility?

[15] The Minister submits that the panel failed to properly assess the credibility of the evidence of Mr. Jin and Ms. Kim, or that it failed to assess their credibility at all. Relying on *Canada (Minister of Citizenship and Immigration) v. Nyari*, [2002] F.C.J. No. 1312, 2002 FCT 979, the Minister submits that this constitutes a reviewable error.

[16] In this respect, the Minister has pointed out a number of inconsistencies, discrepancies and contradictions in the evidence of the couple, and submits that these were material to the issues to be determined by the panel. In the Minister’s view, the panel’s failure to examine these problems with the evidence, and assess the credibility of Mr. Jin and Ms. Kim accordingly, renders its factual findings based on their evidence perverse or capricious.

[17] The Court notes that the panel did address the issues which concern the Minister, albeit rather perfunctorily. It wrote:

The panel heard testimony about other issues. There were a number of inconsistencies in accounts including the fact that the applicant initially told the visa officer that she was pregnant with the appellant’s child before acknowledging that the child was adopted.

The evidence about the adoption, for example, why the appellant couldn't marry the applicant and adopt the child himself is not entirely clear. And how the appellant's son ended up being listed on the appellant's family Registry form as his natural son was never fully explained. However, these issues do not undermine the panel's conclusion that the appellant and applicant share a marriage that is ongoing and that will likely continue whether the applicant comes to Canada or not.

[18] While it might have been preferable for the panel to have undertaken a more fulsome analysis, I cannot agree with the Minister that the brevity of its discussion results in a reviewable error.

[19] The Minister also challenges the panel's finding that the marriage will survive, arguing that this finding is based solely on Ms. Kim's statement to a visa officer that "she has been with him so long and their child is growing, and he's been supporting her and the child for several years, she cannot leave him". However, a careful reading of the panel's decision indicates that it did not rely solely on her testimony in reaching its conclusion that the relationship would continue. This is what the panel wrote with respect to the relationship:

This is a type of quid pro quo marriage that happens all the time, with perhaps varying degrees of love or affection. The panel is of the opinion that this dynamic is also at work in this relationship, and even if there is an immigration interest of the applicant, the panel is hard pressed to envisage her leaving this marriage, if she was to gain admission to Canada or indeed if she does not given the benefits she derives from the relationship. And if the marriage continues with the appellant and applicant in an ongoing relationship it is, in effect, a genuine marriage. (emphasis added)

[20] The benefits Ms. Kim derives from the relationship – a son and financial security – were evident from documentary evidence before the panel, in addition to the couple's testimony.

Accordingly, an assessment of their overall credibility was not crucial to the panel's analysis of whether or not their marriage will continue.

[21] No question was proposed for certification. On the facts, no question is certifiable.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application is dismissed; and
2. No question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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AND IMMIGRATION v.
KEUN SUP JIN

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**REASONS FOR JUDGMENT
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