

Federal Court



Cour fédérale

Date: 20100422

Docket: IMM-4661-09

Citation: 2010 FC 434

Ottawa, Ontario, April 22, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

LI WU SHA and QUAN SHA

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants, Li Wu Sha and Quan Sha are father and son, respectively. They are seeking to set aside a decision made under the *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27, rejecting the inclusion of Quan Sha as a dependent child on his father's permanent residence application. The basis for that rejection was the officer's determination that the vocational school Quan Sha was attending did not meet the requirements of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[2] For the reasons that follow, this application is allowed.

Background

[3] The applicants are citizens of China. In January 2008, Li Wu Sha applied for permanent residence in Canada. He included Quan as a dependent child on his application. At that time, Quan was 23 years-old and was in full-time attendance in a graduate program at the University College London (UCL).

[4] In September 2008, the visa office requested proof of Quan's full-time secondary school enrolment since September 2007. The applicants provided documentation of his enrolment at UCL, including a copy of the Master's degree he was awarded in June 2008. No information was provided of his schooling post-June 2008.

[5] On January 15, 2009, the visa office informed the applicants that Quan did not meet the definition of "dependent child" in section 2 of the Regulations.

[6] On March 3, 2009, the visa office received further information regarding Quan's schooling. The letter confirms that he was enrolled at UCL and graduated on June 23, 2008. It states that he then had an "all too brief summer respite" and returned to UCL on September 23, 2008 "where he personally received his MSc Degree." It goes on to state that Quan enrolled at Shanghai Winworld

Academy, a vocational college, on October 17, 2008, in full-time studies in JAVA EE Computer Software Programming.

[7] On June 15, 2009, the visa officer requested an original China Academic Degrees and Graduate Education Development Center (CADGEDC) report. His correspondence states that he requires an “Original CADGEDC report to demonstrate that the most recent school Sha Quan is attending is a recognized post secondary academic institution.” CADGEDC is an organization that verifies Chinese educational credentials, though there is some dispute between the parties regarding its scope.

[8] The applicants responded on July 10, 2009 that a CADGEDC report would not be forthcoming because it “only undertakes the accreditation and authentication of academic degree certificates and related materials issued in China” (emphasis in the original). The applicants further responded that Shanghai Winworld Academy, a non-academic institution, was nonetheless accredited with the Ministry of Education, and provided a copy of the license issued by the Ministry to the school.

[9] By letter dated July 22, 2009, the officer determined that Quan was not a “dependent child” within the meaning of the Regulations. The office informed Li Wu Sha that Quan was therefore not eligible to be included on his application for permanent residence. It is from this decision that the applicants seek judicial review.

[10] The reasons for the officer's conclusion can be found in the Computer Assisted Immigration Processing System (CAIPS) notes, which form part of the decision. The CAIPS notes show that the officer erroneously believed that Quan had ceased his studies at UCL in September 2007, but this error is not material to the decision under review.

[11] In responding to the submissions regarding Quan's enrolment at Shanghai Winworld Academy, the officer states "Proof of studies is insufficient." The officer asked a subordinate staff member to "send request giving applicant 45 days to submit a CADGEDC demonstrating that the most recent school that SHA QUAN is attending is in fact a recognized post secondary academic institution."

[12] In responding to the applicants' further submissions regarding the CADGEDC report, the officer states:

LETTER FROM STEPHEN FIRST INDICATING THAT THEY [HE] DOES NOT PLACE MUCH RELIANCE IN CADGEDC. HE ALSO INDICATES THAT THE INSTITUTE PI'S SON IS ATTENDING IS NOT REGISTERED WITH CADGEDC. CONSULTANT ALSO INDICATES THAT THE INSTITUTE IS RECOGNIZED BY THE MINISTRY OF EDUCATION (SHANGHAI) FOR THE PRC.

[13] The officer did not accept this response.

Issue in Dispute

[14] The issue in this application is whether the officer erred in determining that Quan Sha did not meet the definition of "dependent child" as described in section 2 of the Regulations.

Preliminary Issue

[15] The applicants also raise a preliminary issue as to whether the respondent's affidavits filed in this application constitute new evidence and are therefore improperly before the Court.

[16] The applicants submit that the respondent is attempting to introduce new evidence that was not before the decision-maker. The applicants submit that the two affidavits of Felicia Cheng should be given no weight. It was of interest that the applicant did not raise the same objection with respect to the subsequent affidavit of the decision-maker.

[17] The respondent submits that the material contained in these two affidavits is background material on CADGEDC reports and not new evidence. The respondent cites *Chopra v. Canada (Treasury Board)* et al. (1999), 168 F.T.R. 273 (T.D.) for the proposition that general background information can be provided by way of affidavit on judicial review even if it was not before the decision-maker.

[18] In my view, the respondent is correct. Absent prejudice to the opposing party, and none is alleged by the applicant, affidavit evidence that provides background information relevant to a material issue before the Court on judicial review, may be put before the Court; such affidavit evidence does not constitute impermissible new evidence.

[19] In this case, it is arguably important that the Court understand the scope of a CADGEDC report when reviewing the decision because the officer focused solely on the absence of such a report despite his request for its submission. The two affidavits of Felicia Cheng as background evidence on the scope of a CADGEDC report are therefore allowed.

Analysis of the Issue in Dispute

[20] The applicants submit that the officer's reasons were inadequate because they do not explain why he determined that Quan Sha did not meet the definition of "dependent child". The applicants submit that the officer's reliance on the lack of a CADGEDC report was unreasonable because they had tendered evidence that Quan Sha's school was accredited by the Ministry of Education. The applicants further submit that the officer confused the definition of "dependent child" with an assessment of educational credentials appropriate in the Skilled Worker context. The applicants contend, citing *Yao v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 114, that the respondent's manual (specifically sections 14 and 15 of OP2) gave them a legitimate expectation that they would be given an opportunity to respond to any concerns the officer had regarding the school.

[21] The respondent submits that the officer's reliance on the applicant's response to his CADGEDC report request was reasonable. The respondent submits that any legitimate expectation was met when the officer requested a CADGEDC report from the applicants to verify the school's credentials. The respondent submits that the applicants had the burden of proving that the son met the definition in the Regulations and that they did not meet this burden.

[22] Section 2 of the Regulations defines “dependent child” as follows:

“dependent child”, in respect of a parent, means a child who «enfant à charge» L’enfant qui:

(a) has one of the following relationships with the parent, namely,

a) d’une part, par rapport à l’un ou l’autre de ses parents:

(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or

(i) soit en est l’enfant biologique et n’a pas été adopté par une personne autre que son époux ou conjoint de fait,

(ii) is the adopted child of the parent; and

(ii) soit en est l’enfant adoptif;

(b) is in one of the following situations of dependency, namely,

b) d’autre part, remplit l’une des conditions suivantes:

(i) is less than 22 years of age and not a spouse or common-law partner,

(i) il est âgé de moins de vingt-deux ans et n’est pas un époux ou conjoint de fait,

(ii) has depended substantially on the financial support of the parent since before the age of 22 — or if the child became a spouse or common-law partner before the age of 22, since becoming a spouse or common-law partner — and, since before the age of 22 or since becoming a spouse or common-law partner, as the case may be, has been a student

(ii) il est un étudiant âgé qui n’a pas cessé de dépendre, pour l’essentiel, du soutien financier de l’un ou l’autre de ses parents à compter du moment où il a atteint l’âge de vingt-deux ans ou est devenu, avant cet âge, un époux ou conjoint de fait et qui, à la fois:

(A) continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and

(A) n'a pas cessé d'être inscrit à un établissement d'enseignement postsecondaire accrédité par les autorités gouvernementales compétentes et de fréquenter celui-ci,

(B) actively pursuing a course of academic, professional or vocational training on a full-time basis, or

(B) y suit activement à temps plein des cours de formation générale, théorique ou professionnelle,

(iii) is 22 years of age or older and has depended substantially on the financial support of the parent since before the age of 22 and is unable to be financially self-supporting due to a physical or mental condition.

(iii) il est âgé de vingt-deux ans ou plus, n'a pas cessé de dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents à compter du moment où il a atteint l'âge de vingt-deux ans et ne peut subvenir à ses besoins du fait de son état physique ou mental.

[23] The relevant provision is subsection 2(b)(ii). Since Quan Sha was over the age of 22 at the relevant time, he could only be considered a “dependent child” of his father if he had been continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and was actively pursuing a course of academic, professional or vocational training on a full-time basis since the age of 22. It is clear that Quan Sha’s enrolment at UCL

satisfied this requirement up to mid-2008. However, after Quan graduated from UCL, he had to be enrolled and actively pursuing full-time education elsewhere to continue to meet this definition.

[24] In *Yao*, Gauthier J. reviewed the duty of fairness in the circumstances of the case at bar and concluded at para. 24 that the duty “was at the lower end of the spectrum.” Nonetheless, she held that there is at least a minimal duty to provide reasons as to why the officer determined that a given applicant was not a “dependent child” within the meaning of the Regulations.

[25] In my view, when the officer’s reasons are read as a whole, including the CAIPS notes, it is apparent why the officer rejected Quan Sha as a “dependent child”. The officer was clearly concerned with whether his school met the requirements described under the “dependent child” definition in the Regulations. The Regulations require the post-secondary institution to be “accredited by the relevant government authority.” The officer’s request for a CADGEDC report was in relation to this accreditation.

[26] Consequently, the reasons are adequate, satisfy the duty of fairness, and do not constitute a reviewable error.

[27] The applicants were given an opportunity to respond to the officer’s concerns regarding Quan Sha’s school when he asked for a CADGEDC report. If the officer was not satisfied with the applicants’ response to this request, which he suggests in his affidavit, he was not under an obligation, in those circumstances, to seek further clarification from the applicants. In my view, the

officer did not breach the duty of fairness, as was alleged, by failing to meet the applicants' legitimate expectations.

[28] What is problematic, in my view, is the officer's reliance on the lack of a CADGEDC report. Neither the Regulations nor the respondent's guidelines stipulate how an officer is to determine whether a post-secondary institution "is accredited by the relevant authority."

[29] The officer stated in his affidavit that a CADGEDC report was sought because this "is the recognized institution that we rely on as per section 73 of the [Regulations]". Section 73 of the Regulations defines terms that apply only to the Skilled Worker provisions of the Regulations. This application is not a Skilled Worker application.

[30] In this case, the officer requested a CADGEDC report "to demonstrate that the most recent school Sha Quan is attending is a recognized secondary academic institution." The applicants provided an answer as to why the report would not be forthcoming, and tendered evidence that Quan's school was "accredited by the relevant government authority." The officer in his reasons failed to explain why this evidence, a copy of the school's license from the Ministry of Education, was rejected. The officer states in cross-examination:

I did not establish whether or not this was an accredited school. After the applicant's refusal to submit CADGEDC, I did not give further consideration to the academic credentials, the educational credentials.

[31] The officer, in cross-examination, states that he noted the school's license that the applicants submitted; however, the officer failed to consider whether this was sufficient proof of accreditation. He appears to have rejected it out of hand as it was not the CADGEDC that had been requested. The officer seems to have formed the view, most likely because he confused the assessment of educational credentials on a Skilled Worker application with the definition of dependent child, that the credentials of the school could only be established through the CADGEDC report he had requested.

[32] The officer failed to discuss whether the Ministry of Education was "the relevant government authority" within the meaning of the definition of "dependent child" in the Regulations, even though the officer states in cross-examination that there are "various provincial and municipal level governments all across China that [*sic*] accredits all types of schools." The officer failed to provide any justification in either his decision letter or his CAIPS notes indicating why he rejected the applicants' submissions. The officer states that after the refusal to submit the CADGEDC report he did not consider the matter further. In this respect, the decision was insufficiently justified and is therefore unreasonable. On this basis, I allow the application.

[33] Neither party proposed a question for certification. I find that no question arises on these facts that meet the test to be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application is allowed and the application is referred to a different officer for determination; and
2. No question is certified.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4661-09

STYLE OF CAUSE: LI WU SHA ET AL. v. MCI

PLACE OF HEARING: VANCOUVER

DATE OF HEARING: APRIL 7, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** ZINN J.

DATED: APRIL 22, 2010

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