Federal Court  Cour fédérale

**Date: 20110503**

**Docket: IMM-6946-10**

**Citation: 2011 FC 514**

**Toronto, Ontario, May 3, 2011**

**PRESENT: The Honourable Madam Justice Snider**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Applicant**

**and**

**MING YOU CHEN**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The Respondent, Mr. Ming You Chen, wishes to sponsor his wife, Ms. Mei Ling Lin, to come to Canada. In a decision dated February 23, 2009, his wife's application for permanent residence as a member of the family class was refused by a visa officer (the Officer), principally on the basis that neither she nor the Respondent had the financial means to support the Respondent's wife in Canada. The Respondent appealed this decision to the Immigration Appeal Division of the Immigration and Refugee Board (the IAD). In a decision dated November 16, 2010, a panel of the

IAD allowed the appeal. The Minister of Citizenship and Immigration seeks to overturn the IAD's decision.

[2] The Respondent has advised the Court that "he is no longer interested in being part of these Federal Court proceedings" and that he should be considered to be a "non-opposing Respondent". The Respondent did not appear at the hearing of this judicial review.

[3] I am satisfied this application should be allowed on the basis that there was a serious breach of the rules of procedural fairness.

[4] On March 20, 2009, the Respondent filed a Notice of Appeal with the IAD. Nothing occurred with this appeal until July 29, 2010, when the IAD sent the Respondent a letter requesting:

> ... written submissions and any documents which may assist in settling the appeal without having an oral hearing, and determining whether it may be resolved more quickly in an oral hearing or if it's more suitable to evaluate the evidence "in Chambers".

[5] In a response dated August 30, 2010, the Respondent's counsel provided written submissions to the IAD, addressing the merits of the appeal. The Minister did not make any submissions.

[6] On November 4, 2010, the IAD, in chambers and apparently based on the written submissions of the Respondent, allowed the appeal. The reasons of the IAD are short:

> The appeal is allowed. The file is to be sent back to the visa post to determine if the documents now received satisfy their concern regarding s.39 and for any further processing necessary.

[7] The Minister was aware that an appeal had been commenced. It appears that the Minister was given notice of the existence of an appeal, as the letter sent to the Respondent requesting his submissions was also copied to the Minister's counsel, and Respondent's counsel also provided the Minister's counsel with their submissions.

[8] However, the Minister was never provided with notice that the IAD would be making its decision on the basis of the responses to the July 29, 2010 letter, without an opportunity for further submissions or arguments. The IAD only asked for written submissions specifically from the Respondent for the purpose of determining whether it was necessary to proceed with an oral hearing or whether it was possible to dispose of the appeal through written submissions. The only date in the letter referred to the date by which the Respondent's submissions were to be made, and made no mention of any date by which the Minister was required to make submissions. By proceeding as it did, the IAD denied the Minister its right to be heard, thereby breaching one of the most fundamental rights of a party to a proceeding.

[9] On these facts, it was manifestly unfair for the IAD to render a decision without providing the parties with notice that it was prepared to render a decision and without providing one of the parties with any opportunity to participate. The Applicant was denied the opportunity to participate in the appeal in a meaningful way and was denied the opportunity to be heard. As a result, the IAD breached the rules of natural justice, thereby violating one of the fundamental rules of the adversarial process (*Globe and Mail v Canada (Attorney General)*, 2010 SCC 41 at para. 74). Such a violation amounts to an error in law and a breach of natural justice (*Goyal v Canada (Minister of Employment and Immigration)* (1992), 142 NR 176 (FCA); *Ke v Canada (Minister of Citizenship*

*and Immigration)* (1995), 31 Imm LR (2d) 309 at para. 16 (FCTD); *Oriji v Canada (Attorney General)* (2002), 228 FTR 73 at para. 16).

[10] The application will be allowed. There is no question of general importance for certification.

## JUDGMENT

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

1. The application for judicial review is allowed and the matter referred back to the Board for reconsideration by a different panel of the IAD; and

2. No question of general importance is certified.

"Judith A. Snider"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6946-10 |
| **STYLE OF CAUSE:** | THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. MING YOU CHEN |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MAY 2, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT BY:** | SNIDER J. |
| **DATED:** | MAY 3, 2011 |

**APPEARANCES:**

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|---|---|
| Brad Gotkin | FOR THE APPLICANT |
| Vladimir Semyonov | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Myles J. Kirvan<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE APPLICANT |
| Vladimir Semyonov<br>Barrister and Solicitor<br>Toronto, Ontario | FOR THE RESPONDENT |