Federal Court  Cour fédérale

Date: 20110630

Docket: IMM-6892-10

Citation: 2011 FC 812

Ottawa, Ontario, June 30, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

CUI WANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of the decision of the Immigration Appeal Division dated October 22, 2010 refusing the applicant's appeal from a visa officer's decision in Hong Kong not to grant the applicant's spouse a permanent resident visa.

BACKGROUND

[2] The applicant became a permanent resident of Canada on December 27, 2005 as a dependent of her father who was sponsored by his then-wife. Shortly after her arrival in Canada, the applicant's friend, Shulin Chen, introduced her to Mr. Liu. As Mr. Liu was residing in China at the time they began to communicate by phone and via the Internet. This was in May 2006. In December 2006, Mr. Liu proposed to the applicant and she accepted. The applicant travelled to China on January 29, 2007 where she met Mr. Liu for the first time. They were married nine days later. They went on a honeymoon to Wuyi Mountain after their wedding. Upon the applicant's return to Canada, the two continued to communicate by phone and online. This was approximately four to five times per week.

[3] On May 6, 2008, a visa officer interviewed Mr. Liu in Hong Kong. During the interview the visa officer disclosed to Mr. Liu that the visa officer had received an anonymous letter that included allegations that his marriage was a marriage of convenience.

[4] The visa officer refused Mr. Liu's application for permanent residence as the officer was not satisfied the marriage was genuine and not entered into for the purposes of immigration to Canada. The applicant appealed to the Immigration Appeal Division (IAD). On October 22, 2010 the IAD refused the applicant's appeal.

DECISION UNDER REVIEW

[5] On the *de novo* hearing, the IAD found that the applicant failed to meet her evidentiary burden that their marriage was genuine or not entered into for the purpose of gaining status. The IAD made a negative determination based on implausibility findings and negative credibility findings.

ISSUES

[6] The determinative issues in this judicial review are as follows:

1. Did the IAD rely on a "Poison Pen" letter in determining the applicant's appeal and, if so, was that unreasonable?
2. Were the IAD's findings, as a whole, reasonable?

ANALYSIS

[7] The Court had some additional difficulty in considering this matter because the transcript of the IAD hearing was cut off during the applicant's oral evidence. The evidence of the husband was complete. Counsel for the parties and the Court noticed this in preparing for the hearing. At the hearing, counsel for the applicant asked the Court to consider whether it could proceed in the absence of a complete record of the IAD hearing. The respondent took the position that the hearing should proceed and cited *Kandiah v. Canada (Minister of Employment and Immigration) (F.C.A.)*

(1992), 141 N.R. 232, 6 Admin. L.R. (2d) 42 and *Canadian Union of Public Employees v. Montreal (City)*, [1997] 1 S.C.R. 793 ("C.U.P.E.").

[8] These cases stand for the proposition that the failure of an administrative tribunal to record its proceedings does not, in itself, constitute a denial of procedural fairness. Absent a statutory right to a transcript, the Court must determine whether the record before it allows it to properly dispose of the application: *C.U.P.E.*, above at paragraph 81. Here, the applicant had provided affidavit evidence of her testimony at the IAD hearing and the reasons under review contained references to that testimony. On considering the matter, I was satisfied that there was a sufficient record for judicial review of the IAD decision to proceed.

Standard of Review

[9] Determinations of whether a relationship is genuine or is entered into for the purpose of obtaining status under the IRPA are purely factual in nature and the IAD is afforded a high degree of deference by this Court. Their decisions are reviewable on the reasonableness standard: *Kaur v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 417 at para. 14. The Federal Court must consider the existence of justification, transparency and intelligibility and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 at para.47; *Canada v. Khosa*, 2009 SCC 12, [2009], 1 S.C.R. 339 at para. 59.

[10] Where procedural fairness is in question, the proper approach is to ask whether the requirements of natural justice in the particular circumstances of the case have been met. A standard of review analysis is not required: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 at paras 52 and 53. Deference to the decision-maker is not at issue. See: *Ontario (Commissioner Provincial Police) v. MacDonald*, 2009 ONCA 805, 3 Admin L.R. (5th) 278 at para. 37 and *Bowater Mersey Paper Co. v. Communications, Energy and Paperworkers Union of Canada, Local 141*, 2010 NSCA 19, 3 Admin L.R. (5th) 261 at paras. 30-32.

Did the IAD rely on a "Poison Pen" letter in determining the applicant's appeal and, if so, was that unreasonable?

[11] In essence, the applicant claims that the IAD relied on the "poison pen" letter when making its conclusion as to the genuineness of the applicant's marriage. The applicant says it was unfair to rely on the letter especially when it was not disclosed to the applicant or her husband.

[12] There in nothing in the IAD's reasons to suggest that it relied on the "poison pen" letter in reaching its conclusion as to the *bona fides* of the marriage. As the respondent correctly points out, the letter is not even part of the official record. Furthermore, out of an eight-page decision, the letter is only touched upon briefly in the background section. Nowhere else does the IAD refer to the letter or use it as a basis for its negative finding. It is clear from reading the decision as a whole that the IAD did not rely on this letter when assessing the credibility of the applicant and/or her spouse.

[13] Moreover, the applicant's contention that there was a breach of procedural fairness because the letter or its particulars were not disclosed to the applicant or her husband is without merit. It has

been held that a “poison pen letter” does not necessarily have to be disclosed to an applicant so long as the applicant is made aware of the allegations contained therein: *D’Souza v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 57, 321 F.T.R. 315 at para. 14. This is what occurred here. During the applicant’s husband’s interview, the visa officer explicitly indicated that they had received an anonymous letter and gave him the opportunity to respond to the visa officer’s concerns: Visa Officer’s Decision, Applicant’s Record, pgs. 50-52. No breaches of natural justice can said to have been committed.

Were the IAD’s findings reasonable?

[14] The IAD’s negative determination was based on implausibility findings and negative credibility findings. One example involved the applicant’s testimony that the friend who introduced them helped her move from her stepmother’s home to her own rented apartment at a time when she had no money and no foreseeable means of paying the rent. The applicant testified that she borrowed money and repaid it once she was working. Her records showed, however, that she was unemployed from February 2002 to January 2006 and that from August 2006 to March 2007 she was self-employed. When her employment record was put to her, the applicant testified that she had some savings she used. It was only when asked about the source that she testified to having borrowed money to pay her bills. The IAD found these responses put her credibility into question.

[15] The applicant’s affidavit explains that she borrowed this money from her father but the affidavit was signed in December 2010 and the reasons of the IAD do not specify this fact. Seeing as it is established law that the IAD is in the best position to assess the credibility of an account

(*Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315, 42 A.C.W.S. (3d) 886 (F.C.A.) at para. 4), and the Court owes a high degree of deference to the IAD based on the factual nature of these kinds of claims, it cannot be held that the IAD erred in finding the applicant's answers to these questions undermined her credibility.

[16] Given the closeness of the applicant and her mother, and the number of times per week they spoke, it was reasonable that the IAD drew an adverse inference from the fact that she did not tell her mother about the marriage proposal and acceptance for six days. It is uncharacteristic behaviour for someone who is close with their parents and who communicates with them frequently by phone not to tell them about an engagement. When asked why she did not tell her mother immediately, the applicant explained it was because she was busy with work. When it was pointed out to her that she was unemployed at that time, the applicant became non-responsive. It was thus reasonable for the Board to make a negative credibility finding based on these questionable responses.

[17] In July 2006, the applicant switched telephone companies in order to create a record of her calls to her husband. Her husband testified that their relationship deepened in May-July 2006 but that there was no talk of marriage before October 2006. The IAD reasonably found that her actions of creating a record of conversation with her husband were, at best, premature. It is understandable why this behaviour, given the timing of the development of their relationship, gave the IAD concern as to the genuineness of their marriage.

[18] It was also not unreasonable to give little weight to the consistent testimony the applicant and her husband gave with respect to why they wanted to come to Canada. They both said they wanted to raise a family here and were in love, stressing the ecological benefits of living in Canada. While this may be true, the IAD fairly stated that these were the types of comments parties in this situation might be reasonably expected to make.

[19] Finally, it was open to the IAD to find that based on the totality of evidence, the trips the applicant made to China were not necessarily to see her husband. The applicant's mother was also in China and if the IAD already had credibility concerns, it was open to the tribunal not to attribute much weight to the applicant's contention that the trips were to see her husband, rather than her mother.

[20] The IAD raised other concerns, i.e. that the applicant's husband did not know very much about the relationship between her and the person who introduced them, and provided a different date of introduction from that of the applicant. The IAD found this negatively affected the applicant's credibility. These are not striking issues on their own but given the other legitimate concerns raised by the IAD it was open to it to make a negative finding from this evidence.

[21] This application will be dismissed. No questions of general importance were proposed for certification and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6892-10
STYLE OF CAUSE:	CUI WANG and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 8, 2011
REASONS FOR JUDGMENT JUDGMENT:	MOSLEY J.
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