

Federal Court



Cour fédérale

Date: 20111107

Docket: IMM-1106-11

Citation: 2011 FC 1268

Ottawa, Ontario, November 7, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

YAN CHEN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of a decision, dated February 1, 2011, by the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada (IRB) which dismissed the applicant's appeal of a decision refusing her application to sponsor her spouse for permanent residency. For the reasons that follow the application is dismissed.

[2] Mrs. Yan Chen, the applicant, formerly of the Peoples Republic of China (PRC) is a Canadian permanent resident. She attempted to sponsor her spouse, Mr. Feng, and his son as

permanent residents. Both are citizens of the PRC. Their applications were refused by a visa officer in Hong Kong. Mr. Feng's application was refused under sections 39 and 11 of the *Immigration and Refugee Protection Act*, (S.C. 2001, c. 27) (*IRPA*) as well as section 4(1) of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) (*IRPR*) on the basis that Mr. Feng would be unable to support himself in Canada and on the basis that the marriage between him and Mrs. Chen is not genuine. Mrs. Chen appealed that decision to the IAD and the appeal was subsequently dismissed.

[3] Mrs. Chen has been married twice before and her present husband, Mr. Jin Feng, has been married once before. Mrs. Chen gained Canadian permanent residency status when the husband of her second marriage successfully sponsored her. Both Mrs. Chen and Mr. Feng have children from their previous marriages. Mrs. Chen has a 24-year old daughter who lives with her boyfriend in Vancouver, Canada and Mr. Feng has a 16-year old daughter and a 21-year old son. Mr. Feng's daughter was not included in the sponsorship application.

[4] The question of a marriage's genuineness is a question of fact and will attract a standard of reasonableness per *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Buenavista v Canada (Citizenship and Immigration)*, 2008 FC 609. The issue in this case, therefore, is whether the IAD's sponsorship appeal decision is reasonable.

[5] The Court notes that Mrs. Chen does not challenge the IAD's upholding of the Visa Officer's finding that her husband, Mr. Feng, is unable to support himself and his son financially in Canada. Section 39 of *IRPA* provides as follows:

39. A foreign national is inadmissible for financial reasons if they are or will be unable or unwilling to support themselves or any other person who is dependent on them, and have not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made.

39. Emporte interdiction de territoire pour motifs financiers l'incapacité de l'étranger ou son absence de volonté de subvenir, tant actuellement que pour l'avenir, à ses propres besoins et à ceux des personnes à sa charge, ainsi que son défaut de convaincre l'agent que les dispositions nécessaires — autres que le recours à l'aide sociale — ont été prises pour couvrir leurs besoins et les siens.

Analysis

[6] The arguments before me are two-fold: first, that Mrs. Chen and Mr. Feng are not in a genuine marriage, and secondly, that a breach of natural justice occurred at the hearing.

[7] Section 4 of the *IRPR* provides the legislative framework.

4. (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership

(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or

(b) is not genuine.

4. (1) Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :

a) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;

b) n'est pas authentique.

[8] Pursuant to section 4, the IAD upheld the decision that Mrs. Chen's and Mr. Feng's marriage was not genuine, finding:

Based on the evidence before me, I conclude that the appellant has not met the onus upon her to prove on a balance of probabilities that the marriage to the applicant was not entered into primarily for the

purpose of acquiring status under the Act and that it is genuine.
Therefore, the appeal is dismissed.

[9] In making such a finding counsel for Mrs. Chen argues that the IAD performed a microscopic review of the facts and misrepresented or misconstrued the evidence before it.

[10] The IAD found based on the testimony supplied by Mrs. Chen and Mr. Feng, that their evidence lacked cogency and was, in some respects, irreconcilable. The IAD Officer wrote:

The issue of when the appellant and the applicant began a boyfriend and girlfriend relationship was canvassed at length at the hearing. The appellant could not adequately explain how her relationship with the applicant, which she described as that between friends, changed to a boyfriend and a girlfriend relationship in February 2006. The appellant travelled to the PRC in November 2006. She registered her marriage with the applicant two days after her arrival in the PRC. No credible evidence was adduced at the hearing to explain how the relationship between the appellant and the applicant progressed from that of a boyfriend and girlfriend relationship to the marriage proposal and acceptance in September 2006. The absence of an adequate explanation in this important area detracts from the appellant's credibility and undermines her claim that the marriage is genuine.

[...]

I find that much evidence in this case, including most of the testimony of the witnesses in significant areas regarding their initial encounters and overall development of the relationship, lacks cogency.

[11] When one spouse substantively contradicts the testimony of the other spouse it is not microscopic for the decision-maker to treat those substantive contradictions as undermining the credibility of one or both of them. In this case, Mrs. Chen was contradicted by Mr. Feng on facts that were important. Answers as to why Mrs. Chen waited two years to file the permanent residency application, why Mr. Feng's daughter was not included in the sponsorship application,

and how often Mrs. Chen spoke to Mr. Feng's children on the telephone were either not forthcoming or, when they did, contradictory. Such contradictions support the IAD's finding that Mrs. Chen's and Mr. Feng's testimony was irreconcilable.

[12] The IAD also noted that Mr. Feng was confused as to the circumstances which prompted his wife's first divorce with those that prompted his wife's second divorce. The IAD member reasonably thought that, in a genuine marriage, this would be known.

[13] The IAD also noted that while the applicants' relationship progressed from a friendship in February 2006, to a marriage proposal and acceptance in September 2006 with little contact in-between, supporting its observation that "the absence of an explanation in this important area detracts from the applicant's credibility and undermines her claim that the marriage is genuine."

[14] In addition, the IAD observed a significant discrepancy with respect to the extent to which Mrs. Chen spoke to Mr. Feng's two children. In addition, the IAD observed that even though Mr. Feng was very close to his daughter, Mrs. Chen spoke to her only six times prior to the application, and not once to his son. The IAD also found that Mrs. Chen had not demonstrated the efforts to find employment for Mr. Feng in Canada one would reasonably expect from a spouse.

[15] Their answers to the IAD demonstrated a superficial understanding of one another. Mr. Feng did not know the details of Mrs. Chen's previous marriages - nor much else about her - to the degree that one might reasonably expect of a current husband. A review of the transcript

supports the conclusion that Mrs. Chen and Mr. Feng were vague about the nature of their relationship and their marriage.

[16] The IAD's finding that their testimony lacks cogency is also within the range of possible, acceptable outcomes defensible in respect of the facts and law. Cogency is defined in the *Canadian Oxford English Dictionary* (Second Edition) as "compelling" or "convincing." Neither Mrs. Chen nor Mr. Feng provided any evidence that supported a more convincing or compelling conclusion than the one drawn by the IAD. I do not find that the IAD demonstrated a microscopic review of the facts.

Breach of Natural Justice

[17] This is an attractive argument but it remains one that cannot succeed. It is true that the IAD member demonstrated a pre-occupation with the length of time for questioning during the hearing, however it cannot be said that the that the restrictions on time prejudiced Mrs. Chen or her counsel at the hearing or precluded advancing her case. While the IAD member did at one point instruct Mrs. Chen's counsel that he would be permitted to ask only one further question and argued about it with Mrs. Chen's counsel and thereby wasted time, the IAD member did allow Mrs. Chen's counsel to question her at greater length beyond this one question.

[18] I note as well that: (1) The hearing was set for one half of a day which the IAD member equated to 3.5 hours of hearing time. Mrs. Chen's counsel agreed to the time limit at the beginning of the hearing and did not voice any objections to the time allotted; (2) Counsel for the Minister was subject to the same time constraints; (3) Mrs. Chen was not prejudiced substantively, or

procedurally, because she was able to present as much evidence as time allowed; and (4) Counsel was advised to allocate his time carefully between his two witnesses, and he indicated that he would do this within the allotted time.

[19] Courts, at all levels, and administrative tribunals have the discretion, if not the obligation, to ensure that the proper balance is struck between ensuring a full and fair hearing and that of ensuring that access to justice is effective and efficient. How that balance is set is discretionary, but supervisory courts will always ensure that the fundamentals of natural justice are not compromised. A right to a fair and full hearing does not require tribunals, or courts, to abdicate their control over dockets to the parties. What constitutes a fair hearing is largely a contextual analysis, informed by the nature of the rights in issue, the provisions of the legislative or regulatory scheme which underlies the decision making process. A fair hearing is not necessarily the “fullest” of hearings. In the end, the controlling determination of fairness will be whether the applicant or party had an opportunity to respond to the case against them.

[20] The application for judicial review is dismissed.

[21] No question for certification has been proposed and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1106-11

STYLE OF CAUSE: YAN CHEN v. THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto

DATE OF HEARING: October 6, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** RENNIE J.

DATED: November 7, 2011

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