

Federal Court



Cour fédérale

Date: 20161103

Docket: IMM-522-16

Citation: 2016 FC 1227

Ottawa, Ontario, November 3, 2016

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

ZHI FA CAI

Applicant

And

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Zhi Fa Cai [Mr. Cai], challenges the decision of an Immigration Officer [the officer] who rejected Mr. Cai's application for permanent residence. The officer determined that the marriage between Mr. Cai and his sponsor, Ms. Jacklyn Chu [Ms. Chu], was not genuine or was entered into primarily for the purpose of acquiring status under the *Immigration and Refugee Protection Act*, SC 2001 c 27 [the Act].

[2] The officer determined that Mr. Cai did not meet the definition of a spouse or common-law partner and therefore did not meet the requirements set out in subsection 124(a) of the *Immigration and Refugee Protection Regulations* SOR/2002-227 [the Regulations].

[3] For the reasons that follow, I find the officer's decision to be reasonable.

II. Background

[4] Mr. Cai is a citizen of the People's Republic of China [China]. He was previously married from January 1982 to April 2013. Ms. Chu is a naturalized Canadian citizen and was previously married from November 1990 to November 2003. Both parties have two adult children from their other relationships.

[5] Mr. Cai met Ms. Chu in China in 2004. In 2005, Mr. Cai decided to send his son to school in Vancouver. He asked Ms. Chu if his son could board with her and she agreed.

[6] Mr. Cai and Ms. Chu's evidence is that they began an intimate relationship in March 2006 while he was still married to his first wife. Not until June 2011 was it alleged that Mr. Cai separated after 31 years from his ex-wife but continued to reside with his wife. The only documentation to support the long term relationship was one photograph from 2012.

[7] Mr. Cai initially entered Canada on a temporary resident visa on September 8, 2012. On March 31, 2013, a section 44 report was completed on Mr. Cai by the Canada Border Services Agency [the CBSA] as a Chinese arrest warrant had been issued against him. It was determined

by the CBSA that the alleged offence in China corresponded to a charge of fraud over \$5,000.00 in Canada for which there is a maximum prison term of 14 years (well above the 10 year threshold for serious criminality which bars claims for refugee protection).

[8] On April 18, 2013, Mr. Cai and his ex-wife's divorce was finalized in China. Mr. Cai attended an inadmissibility interview with the CBSA on May 3, 2013, and he married Ms. Chu the following day.

[9] On May 15, 2013, Mr. Cai's visa extension application was refused and in September of that same year it was determined that Mr. Cai was excluded from refugee protection due to serious criminality. On November 21, 2013, Mr. Cai applied for a Pre-Removal Risk Assessment [PRRA]. Mr. Cai's PRRA was refused but was sent back by this Court on judicial review for redetermination and he received a positive restricted PRRA determination under s. 112(3) of the IRPA on July 23, 2015. This does not allow him to apply for permanent residency but does allow him protection from removal to China.

[10] On May 28, 2014, Mr. Cai and Ms. Chu submitted an application for permanent residence under the spouse/common-law partner class after their initial application was returned due to a technical defect. Mr. Cai and Ms. Chu were interviewed by the officer on December 18, 2015. The officer found among other findings that the majority of documentation submitted in support of Mr. Cai's application for permanent residence, including wills naming each other as beneficiaries, were dated from the year the application was made not the year the couple was married.

[11] On December 24, 2015, the officer found that Mr. Cai did not meet the requirements of the spouse/common-law partner class and the application for permanent residence was denied. Mr. Cai was notified of the decision in a letter dated January 7, 2016.

III. Issues

[12] The issues raised by Mr. Cai are:

- A. Was the officer's finding that Mr. Cai is not a spouse or common law partner reasonable?
- B. Did the officer breach principles of natural justice and the duty of procedural fairness by relying on extrinsic evidence and failing to inform Mr. Cai of his or her concerns?

IV. Standard of Review

[13] The officer's decision is reviewable on the reasonableness standard. The Court must be satisfied as to the existence of justification, transparency and intelligibility within the decision-making process, and find that 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 SCC 9 at paras 47-48 [Dunsmuir]).

[14] Questions involving a breach of procedural fairness are reviewable on the correctness standard (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 [Khosa]).

V. Analysis

[15] My analysis of the decision is broken down into four broad areas of concern identified by Mr. Cai: 1) ignored evidence; 2) absurd inferences; 3) extrinsic evidence; and 4) failure to inform Mr. Cai of the officer's concerns. The first two of these areas will be assessed on a reasonableness standard whereas the last two are concerned with procedural fairness and I will assess them on a correctness standard.

A. *Ignored Evidence*

[16] Mr. Cai argues that the officer's decision indicates he did not read his or Ms. Chu's statutory declarations. He submits that much of the documentation provided such as joint account statements, wills, life insurance policies, and wedding cards was relevant to many of the officer's findings but was not included in the officer's reasons.

[17] Furthermore, the officer's insistence on earlier evidence ignores the fact that Mr. Cai and Ms. Chu had been in a secret relationship for many years. According to Mr. Cai, the fact the officer asks for documentation of a secret romance is proof that the statutory declaration was ignored.

[18] I agree with Mr. Cai that the statutory declarations were referred to improperly as letters by the officer. This may be because they were not in an affidavit form although the documents are sworn and should have been referred to as statutory declarations. Having read through the declarations in question, I disagree with Mr. Cai that the officer ignored this evidence. The

statutory declarations of both Mr. Cai and Ms. Chu do not explain why there is no evidence of an alleged seven year romantic relationship. In fact in neither statutory declaration is it stated by either party that the relationship was carried out in secret. Neither family ever saw them together despite their claim of seeing each other frequently while Ms. Chu was in China on business trips and spent weekends together. I would expect at least some evidence of a long standing “secret affair” such as transportation documentation to see each other, cards, texts, emails, gifts or even pictures. Or that they would have explained how they kept such a long standing affair secret and why there was no indicium of a long romantic relationship.

[19] Mr. Cai submits that the statutory declarations are consistent in their explanation of when they first met and when they began cohabiting. Furthermore, his declaration explains why he wanted to separate from his first wife. Any inconsistency in testimony is explained by confusion stemming from translation.

[20] What Mr. Cai fails to explain is how or why he was involved in two relationships between 2006 and 2011. Nor does he explain why he and Ms. Chu got married one day after he attended an inadmissibility interview with the CBSA. The timing of the marriage speaks to an arrangement for the purpose of acquiring immigration status.

[21] The officer also found that Mr. Cai knew about the arrest report prior to his CBSA interview on May 3, 2013. This is despite Mr. Cai providing the officer with an original Chinese police clearance certificate dated July 17, 2012, indicating there were no charges against him at that time. Mr. Cai submits that the officer’s finding supports the argument that this evidence was

ignored. Again I do not agree. The only thing the arrest report indicates is that Mr. Cai knew the Chinese police did not want to arrest him on July 17, 2012. Mr. Cai stated that he was not aware of his arrest report until his visa extension application was refused on May 15, 2013. Ms. Chu similarly indicated that she was not aware of Mr. Cai's charges until after their wedding. However, both Mr. Cai and Ms. Chu attended an inadmissibility interview regarding allegations of serious criminality with CBSA the day before they were married (May 3, 2013). Given Mr. Cai and Ms. Chu's contradictory evidence and almost a year between the police clearance certificate and the CBSA interview it was reasonable for the officer to conclude Mr. Cai was aware that the officer would know of the report prior to the interview.

[22] There is a presumption that the officer considered all of the evidence on record (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA)). Additionally, considerable deference is accorded to the officer as he interviewed the parties and heard the evidence. Although the argument was never framed that I should reweigh the evidence, in fact that is what I am being asked to do which is not my role on judicial review.

B. *Absurd Inferences*

[23] Mr. Cai argues that the officer made absurd inferences in order to draw adverse credibility findings against him. What Mr. Cai ignores are the multiple contradictions in both his and Ms. Chu's evidence.

[24] In addition to the contradiction noted above, Mr. Cai and Ms. Chu did not agree on the details of their own wedding. Ms. Chu could not recall the date of their marriage and there were

discrepancies in their responses as to when they met and when they began cohabiting. In his affidavit evidence, Mr. Cai explains this inconsistency by simply stating that he “was confused.” Both named the correct restaurant where their wedding reception was held but Ms. Chu stated that they celebrated their marriage at a restaurant in downtown Vancouver and Mr. Cai stated they celebrated at a restaurant in Richmond. Furthermore, Ms. Chu has not met any of Mr. Cai’s relatives beyond his two children. Mr. Cai has met Ms. Chu’s parents and sister only once.

[25] Mr. Cai submits that there is nothing suspicious about the fact that he and Ms. Chu married less than a month after his divorce had been finalized because they had been in a relationship for such a long time. Therefore, the officer should not have drawn any adverse inference from the timing of the marriage. Mr. Cai also submits that the boarding arrangement for his son with Ms. Chu should not detract from the genuineness of their relationship. Mr. Cai completely ignores the fact that he married Ms. Chu only one day after his admissibility interview with the CBSA. It was open to the officer to draw a negative inference on the genuineness of the marriage given the timing of the wedding so close to his admissibility interview.

[26] Mr. Cai’s presentation regarding his financial situation was equally as confused as his marriage details. He indicated on his permanent resident application that his son met the definition of an eligible dependent. However at his interview, Mr. Cai indicated that his son was working and financially supporting him. Mr. Cai explained that his son only began financially supporting him a year and a half after his application had been submitted. I agree with the Minister that it was reasonable for the officer to make adverse credibility findings with respect to

Mr. Cai's financial independence. If his circumstances did change in this manner, Mr. Cai should have informed Citizenship and Immigration Canada immediately.

[27] Mr. Cai also failed to convince the officer of financial interdependence with Ms. Chu. Little financial documentary evidence was submitted aside from a joint bank statement that showed very few or no monthly transactions. The decision does reference that there was a large deposit of \$17,000 made into the joint account on December 5, 2015. Mr. Cai had been sent a call in letter for an interview on November 11, 2015 for an interview on December 15, 2015. Other financial documents noted was a bank visa that was held by the sponsor and her son where the mortgage payments and other monthly living expenses were made.

[28] It is not enough to argue that the officer failed to refer to specific evidence or make a finding of fact that contradicts evidence before him. There do appear to be discrepancies between the statutory declarations made by Mr. Cai and Ms. Chu, and the respective answers which they gave during the course of the December 18, 2015 interview. There is no evidence that these discrepancies stem from translation or interpretation problems. As the Minister points out, neither Mr. Cai nor Ms. Chu raised this issue in their affidavit evidence and therefore there is no factual basis for this argument to be made on the present application. It was open to the officer to give more weight to the discrepancies than to the documentary evidence provided (*Kaur v Canada (Citizenship and Immigration)*, 2010 FC 417 at para 27).

[29] Mr. Cai's submissions are a request to reweigh the positive and negative findings of his application and substitute my own opinion for that of the officer's which I decline to do.

C. *Extrinsic Evidence*

[30] Mr. Cai submits that the officer breached the duty of fairness by relying on the Chinese arrest report issued in his name without disclosing it to him. Mr. Cai argues that even when the use of extrinsic evidence is contemplated or authorized by an application, an immigration officer's duty to disclose, and the applicant's corresponding opportunity to respond, is not diminished (*Batica v Canada (Minister of Citizenship and Immigration)*, 2006 FC 762 at para 15). As the arrest report was used to impugn his credibility but was not disclosed to him, Mr. Cai argues that he never had the opportunity to respond to the evidence.

[31] I do not agree with Mr. Cai as the omission by the officer was a technical error which occasioned no substantial wrong or miscarriage of justice (*Khosa*, above, at para 43). Mr. Cai does not deny that he knew of the arrest report at the time of the permanent residence interview. He had already attended an inadmissibility interview with the CBSA and had previously had his application for an extension of his temporary resident status rejected on this basis. What he claims is that he did not know the officer knew about the arrest report. Given Mr. Cai's knowledge of the arrest report and its implications to his previous immigration proceedings, I do not believe that the duty of fairness owed to Mr. Cai called on the officer to explicitly present him with it or otherwise provide him with an opportunity to respond.

D. *Failure to Inform Mr. Cai of Officer's Concerns*

[32] Mr. Cai contends that the officer's reasons indicate that the officer had a number of concerns that arose from the documents submitted in support of the application and that

procedural fairness required that the officer inform him of these concerns so that he could respond (*Muliadi v Canada (Minister of Employment and Immigration)*, [1986] 2 FC 205 (FCA); *Enriquez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1091 at paras 26-27).

[33] Mr. Cai's position is that the duty of procedural fairness extends to concerns that the officer had about inconsistencies that arose between Mr. Cai's and Ms. Chu's respective answers during separate interviews of the spouses, and that the officer was obliged to provide him and Ms. Chu with a meaningful opportunity to respond to these concerns (*Huang v Canada (Minister of Citizenship and Immigration)*, 2015 FC 905 at paras 6-9).

[34] I disagree as the parties were already well aware the determinative issue to be determined in the interviews was the genuineness of their marriage. It is not a science but is fact driven and nuanced. Much of the jurisprudence cited by the Applicant involves cases where an immigration or visa officer questioned the veracity of documents submitted in support of an application and failed to apprise the applicant of those concerns. This is not the case in the present application. The concerns that the officer had were based on the ostensible lack of evidence (e.g. only one photo of the couple during their affair) or the timing of when the evidence was produced (e.g. much of the information relating to the financial interdependence was generated around the time that the application was submitted). I find that the officer properly informed Mr. Cai and Ms. Chu of his concerns and allowed them the opportunity to present their evidence as completely as possible. The onus to provide sufficient evidence to satisfy the decision maker of the genuineness of the marriage is on the Applicant.

VI. Conclusion

[35] The totality of the decision is reasonable and the officer made no procedural fairness error. The officer had the benefit of not only the written material that was also before the court but also interviewed Mr. Cai and Ms. Chu. It is not for me to reweigh the evidence and it is not for the Court to grant the application when the decision made is reasonable. I therefore dismiss the application.

[36] No question for certification was presented or arose from the evidence.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. No question is certified.

"Glennys L. McVeigh"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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