

Date: 20070920

Docket: IMM-6745-06

Citation: 2007 FC 945

Toronto, Ontario, September 20, 2007

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

ZILI CUI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant Zili Cui is an adult male citizen of the People's Republic of China. He, together with another adult male citizen of that country, Xin Zhi Deng (whose application is also under consideration by this Court in proceeding IMM-4071-06) entered Canada on a valid visitor's visa. That visa expired. Cui and Deng sought an extension of their visas and were refused. As a result they made a claim for refugee protection in August, 2003. On August 21, 2003, the Applicants Cui and Deng were arrested and held for admissibility hearings on the basis of an allegation that they had committed crimes of serious criminality, namely major fraud, pursuant to subsection 36(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[2] Two different proceedings ensued with respect to the Applicant Cui. The first was an admissibility hearing. On June 24, 2004, Cui was found to be not inadmissible. The Minister appealed that decision and, as of this date, the appeal is still pending. The second proceeding was a Refugee hearing that commenced on March 16, 2005 and continued on June 21, 2005. The Minister participated in this hearing pursuant to paragraph 170(e) of IRPA and invoked Article 1F(b) of the Refugee Convention alleging serious criminality on the part of the Applicant. On November 24, 2006, a decision in respect of the refugee hearing was rendered by a Member of the Immigration and Refugee Board wherein it was determined that the Applicant Cui was excluded from protection under section 98 of IRPA under Article 1F(b). Even absent such exclusion, the Member determined that the Applicant was not a Convention refugee or a person in need of protection. The Member found that there was no credible or trustworthy evidence on which a decision favourable to the Applicant could have been made, thus the claim for refugee protection was rejected. This decision is the one under review by this Court.

[3] Cui raises a single issue in his application namely whether the Minister, or his counsel or agents, acted improperly in the obtaining of a certain document subsequently entered into evidence at the hearing before the Board held in March and June 2005. The document in question is one entitled "Notice of Annuling the (2003) C. Z. Zi, No. 10630 Notarial Certificate" which appears in the original Chinese language at pages 1057 and 1058 of the Tribunal Record and in English language translation at page 1059 of that Record. This document was part of a larger bundle identified at the hearing as Exhibit M-4.

[4] Cui's counsel in his Memorandum of Argument asks that there be a fresh hearing and that the Minister "provide proof that they did not take actions contrary to law."

[5] Cui's position is based on paragraph 166(c) of IRPA which requires that proceedings such as that at issue here "*must be held in private*".

[6] There appears to be no judicial consideration as to what is encompassed in the phrase "in private". A "proceeding" has been considered by Justice Tremblay-Lamer of this Court in *Gagné v. Canada (Attorney General)*, 2002 FCT 711 at paragraphs 27 and 28 where she adopted, *inter alia*, the definition found in Black's Law Dictionary that a "proceeding" contemplates "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and entry of judgment." Thus a "proceeding" as contemplated by paragraph 166(c) of IRPA is not just the hearing but all that which occurs from the institution of the matter until its final disposition.

[7] The document in question is characterized as an Annulment of a Notarial Certificate. It purports to annul a certificate provided by a notary's office in China on April 23, 2003 on the basis that at that time, false documents has been provided by Cui's Chinese attorney. The Notarial Certificate of April 23, 2003 does not appear to be in the Tribunal Record. An earlier Notarial Certificate dated September 11, 2002 is of record at page 771 of the Tribunal Record. It says that it certifies that Cui "*has no record of committing offences against the criminal law during he reside (sic) in China up to the day Aug. 29, 2002.*" When asked about the September 2002 certificate, Cui

indicated in his oral evidence that it was for use in business trips, no particular country was involved. He said at pages 94-95 of the transcript:

MINISTER'S COUNSEL: Okay. You provided us with a notarial certificate indicating that you had no criminal record in China. That certificate is dated September 2002. For what purpose did you obtain that certificate in September 2002?

CLAIMANT (Z. CUI): To get a notarial certificate to apply for a visa for business trip.

MINISTER'S COUNSEL: Which visa?

CLAIMANT (Z. CUI): For September 2002. But the actually certificate could be used (inaudible). There is no particular country that you needed to use for.

MINISTER'S COUNSEL: Okay. But what I asked was, what did you get the certificate for in 2002 and you said to apply – oh, okay. You said to apply for a visa and you're just saying for any business trip that might come up. Is that ---

CLAIMANT (Z. CUI): Yes.

[8] No reference is made in the transcript to any other Notarial Certificate nor to the Annulment document at issue.

[9] In the Tribunal Record, at pages 777 and 778 is a document apparently obtained from a US State Department website explaining what a Chinese Notarial Certificate is. It says in part:

Notarial offices are located in all major Chinese cities and in rural county seats. These offices are part of the Ministry of Justice structure, but are separate from the people's court system.

Notaries in China did not perform the same functions as their American counterparts. Chinese notaries affix their signatures and office seal to certificates that attest to the probity of claims made by the applicants. By regulation, notaries are empowered to issue certificates only after they conclude that the applicant's claims are true. Notarial certificates of birth, death, marriage, divorce, no criminal record and pre-1981 adoptions are, at best, secondary evidence of the events they purport to document. Although these certificates are secondary evidence, they are used because primary evidence is not standardized, is easily forged, and difficult to evaluate. Notarial certificates are easier to interpret than primary evidence and theoretically represent an expert judgment on the part of the notarial official as to the facts documented.

*The certificates can be based upon primary evidence, secondary evidence, testimony of the applicant or other parties, or investigation by the notary. For most notarial certificates of birth or adoption, the primary underlying documentation is the household register (HHR) which appears to be extremely susceptible to fraud and manipulation, especially if the holder of the HHR lives outside of a major metropolitan area. Notarial certificates rarely cite the basis for their issuance.**

Thus a certificate in itself may not be adequate evidence of the facts claimed, and is best used in conjunction with primary and contemporaneous secondary evidence.

[10] Thus a Notarial Certificate appears to have limited evidentiary value and appears at best to be secondary evidence. In this present case at the hearing, neither the Certificate of April 25, 2003 nor the Annulment was referred to in oral testimony nor does the Board refer to either in its Reasons.

[11] At the hearing held in March 2005, a bundle of documents provided by the Minister on February 7, 2005 headed Volume 3 of the Minister's Evidence was addressed by Cui's counsel. That bundle included the Annulment document now at issue. Cui's counsel was concerned primarily that he had insufficient time to prepare a response to the documents in the bundle. No particular reference was made to the Annulment document. Cui's counsel stated that, if it were a criminal matter then, what he referred to as Supreme Court of Canada *dicta*, would have been involved. However, Cui's counsel did not object to the admissibility of the bundle which included the Annulment document. All that he sought was an extension of time, which he received. To quote in part from the lengthy submissions of Cui's counsel at pages 6 and 9 of the transcript of the hearing held March 16, 2005:

But the document of February 7th raises highly significant and new concerns. The document of February 7, 2005, which is headed Volume 3 of the Minister's Evidence, consists of a great number of documents which have been presented to us for the very first time under letter dated February 7, 2005. It consists of allegations of criminals for each of the two applicants, there are alleged transcripts of inquiries of various so-called witnesses for China Life Insurance. Some of them dated well after the admissibility hearings for these gentlemen had been concluded. And therefore, either were developed after the admissibility hearings or, in some cases, were ready, could have been presented at the admissibility hearing, but were not.

Now, if this were a criminal matter, which is not, if the admissibility hearing were a criminal matter, which is not, the Supreme Court of Canada dicta regarding disclosure would clearly have been violated. Now, I said it was not, we're not talking about criminal law, I'm just drawing an analogy here.

. . .

PRESIDING MEMBER: Okay. Counsel, you're making submissions, I gather, there you have no objections to enter this document into evidence. You're not raising any objections.

COUNSEL: No. Well, no, I---

PRESIDING MEMBER: I just want to get that clear. It's only a question of time.

COUNSEL: Perfectly admissible. And if it were there alone, at the end of this hearing I would say exclude them. You know? Because...

[12] As can be seen, Cui's counsel stated that the documents were "perfectly admissible". At page 16 of the transcript of the hearing for March 16, 2005, the bundle of documents was entered as Exhibit M-4.

[13] At pages 21 and 22 of the transcript of March 16, 2005, Cui's counsel stated that he was "fearful the transcript of this proceeding and the evidence given by my clients may wind up not in Canada, were the Charter would apply, but in China." An undertaking was requested of the Minister's counsel that the transcript and evidence not be sent to China. The Minister's counsel replied that "no such undertaking is required by law" but that his office "has no intention of providing the transcripts of this hearing to Chinese authorities." A discussion followed as to whether the documentation would become public if an application for review was taken in the Federal Court.

[14] A review has been taken in this Court, no Order as to confidentiality has been sought or obtained.

[15] At no time during the hearing did Cui's counsel raise any issue as to how the Minister may have obtained the documents now at issue nor as to the propriety as to their use in evidence.

[16] The Federal Court of Appeal has considered the question as to the use in evidence at an application hearing, of documents obtained from Chinese authorities. Pelletier J.A. for the Court found that even if the matter in which the documents were obtained should not have occurred, it does not mean that it was illegal or unlawful. At paragraphs 14 to 16 of *Xie v. Canada (Minister of Citizenship and Immigration)*, [2005] 1 F.C.R. 304 he said:

14 But the fact that something "should not have occurred" does not mean that it is either illegal or unlawful. When pressed as to the basis for the allegation that the warrant was illegally obtained, counsel argued that by bringing the appellant to the attention of the Chinese authorities, the government had increased the risk of torture in the event of her return. Given the requirement in the Convention against Torture that the subscribing parties take steps to prevent torture, the government had breached its treaty obligations which, [page315] for present purposes, ought to be treated as an unlawful act.

15 It is pure speculation as to whether the disclosure of the appellant's refugee claim increased the risk of torture. From what one can gather from the Board's reasons, the risk of torture arises in the course of detention during the criminal investigation. There is nothing before us to suggest that the disclosure that a refugee claim has been made would affect that particular risk, or would create a risk of torture on its own.

16 Even if one assumes that the Chinese diplomatic note is an accurate report of the course of events, the apparent lapse by the consular service does not provide a basis for saying that the warrant

was illegally obtained evidence. Consequently, the question of exclusion of the warrant on the ground that it would bring the administration of justice into disrepute does not arise.

[17] In the present case, Cui's counsel agreed that the documents were "perfectly admissible" and raised no objection before the Board as to how they were obtained. No reference was made to the documents at issue in oral evidence or by the Board in its Reasons. The documents are, in any event, at best secondary evidence.

[18] I find that given in particular the conduct of Cui's counsel before the Board which amounts to a waiver, the issue as to the provenance of the documents cannot now be raised.

[19] There is no question for certification the issues being fact specific. No costs will be awarded.

JUDGMENT

For the Reasons provided:

THIS COURT ORDERS AND ADJUDGES that:

1. The application is dismissed;
2. There is no question for certification;
3. There is no award of costs.

“Roger T. Hughes”

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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