Date: 20090130

Docket: IMM-2469-08

Citation: 2009 FC 103

OTTAWA, Ontario, January 30, 2009

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

ZHANG DAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated April 7, 2008 from the Immigration Section of the Canadian Embassy in China wherein the First Secretary of Immigration, Madam Noëlla Nincevic, acting as visa officer, refused the applicant's sponsorship application based on insufficient humanitarian and compassionate (H & C) factors pursuant to section 25 of the *Immigration and Refugee Protection Act* (IRPA), S.C. 2001 c. 27. The applicant had previously been denied a sponsorship application pursuant to section 117(9)(d) of *Immigration and Refugee Protection Regulations* (IRPR). That decision was upheld by the Immigration and Refugee Board (IRB).

[2] The applicant, Zhang Dan, got married in Canada on April 2005 to Liu Shaojun, her sponsor. The applicant first met her sponsor in 1997 when they were both in high school in China. Liu Shaojun became a permanent resident of Canada in January 2005 and he wanted to sponsor his wife after their marriage in April 2005.

[3] In 2001, the applicant came to Canada on a student visa while Liu Shaojun stayed in China to pursue his studies. The applicant visited him when her schooling was completed.

[4] In 2002, Liu Shaojun came to Canada and lived together with the applicant until they were married.

[5] In 2003, Liu Shaojun applied for permanent residence in Canada which was approved in January 2005. He then filed a sponsorship application on behalf of his wife after their marriage in April 2005. It must be noted that after the wedding in 2005 the applicant went to China to visit family and friends and did not return. They have been apart since that time.

[6] On May 2, 2006, the first application for sponsorship was refused because Liu Shaojun did not declare the applicant as a common law spouse in his application for permanent residence pursuant to paragraph 117(9)(d) of IRPR. At the time he filed his own application, the couple had lived together for more than one year.

[7] He argued that he did not declare the applicant as a common law partner because, in Chinese culture, she would only be considered as a family member once they were officially married. Moreover, he was not aware that because they had been living together for one year, they would be considered common law partners.

[8] The decision to refuse the first application for sponsorship was appealed to the Immigration Appeal Division.

[9] The appeal was dismissed on July 19, 2007. The panel opined that the sponsor and the applicant could apply for relief based on H & C grounds because this case would be a particularly compelling one, especially in view of the appellant's straightforward and credible testimony as well as the obvious cultural differences.

[10] The applicant's husband then filed a second sponsorship application based on H & C grounds.

[11] On February 24, 2008, the couple's lawyer sent a letter to the visa officer in Beijing requesting to be advised when a decision would be made on their file, so they could make their submissions available on time. This letter was never answered.

[12] On April 18, 2008, the couple received a letter dated April 7, 2008, stating that their application has been refused for a second time due to a lack of H & C factors.

[13] On the same date, counsel for the applicant made submissions requesting a reconsideration of the decision.

[14] On May 13, 2008, a letter denying reconsideration was sent to the applicant.

[15] In his affidavit, Liu Shaojun mentioned that before the first visa officer refused their initial application, a letter was sent to them requesting information as to why the application should not be refused. Their experience suggested to them that the second visa officer would do the same the second time with their second application.

[16] Therefore, upon receiving the refusal letter on April 18, 2008, they immediately faxed the submissions to the second visa officer, which were followed by express mail.

[17] In the file, there is also an affidavit of Noëlla Nincevic (First Secretary of Immigration - visa officer), stating in particular that she took the CAIPS notes.

[18] The decision was rendered by the visa officer in Beijing. The visa officer states in her decision that the applicant does not meet the requirements for immigration in Canada. The decision-maker writes in her decision, which is less than two and an half pages in length, that she has assessed the applicant’s application for a permanent resident visa as a member of a family class. The visa officer mentions subsections 12(1) of IRPA and 117(9) of IRPR.

[19] The visa officer also mentions that the applicant's sponsor failed to declare his wife at any time during his own application for permanent residence in Canada. She acknowledges that the applicant's sponsor was not aware that the applicant was his common law partner according to Canadian legislation.

[20] The visa officer was satisfied that the applicant's relationship with her sponsor is genuine, but she does not feel that sufficient H & C factors exist in this case to warrant an exemption of her inadmissibility pursuant to section 117(9)(d) of IRPR.

[21] In her decision, the visa officer also determines that the applicant is not a member of the family class. She also points to subsection 11(1) of the IRPA and concludes that the applicant is inadmissible because she does not meet the requirements of the *Act*. Therefore, she refuses the applicant's application.

[22] The relevant statutory provisions are the following:

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the	11.(1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

requirements of this Act.

(2) The officer may not issue a visa or other document to a foreign national whose sponsor does not meet the sponsorship requirements of this Act.

(2) Ils ne peuvent être délivrés à l'étranger dont le répondant ne se conforme pas aux exigences applicables au parrainage

12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.

12. (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

117. (1) A foreign national is a member of the family class if,

117. (1) Appartiennent à la catégorie du regroupement

with respect to a sponsor, the foreign national is …	familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants …
(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if: …	(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes : …
(d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	(d) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

[23] The applicant claims that the standard of review governing decisions of visa officers respecting H & C applications is reasonableness based on *Baker v. Canada (MCI)*, [1999] 2 S.C.R. 817.

[24] The issues of procedural fairness are decided against the standard of correctness based on *Pushpanathan v. Canada (MCI)*, [1998], 1 S.C.R. 982.

[25] The applicant claims that the decision of the visa officer is not reasonable in that she erred in law in her interpretation of subsection 25(1) of IRPA and paragraph 117(9)(d) of IRPR.

[26] The applicant states that the objective of paragraph 117(9)(d) of IRPR is certainly not to deny applications for permanent residence in Canada from genuine spouses of Canadian citizens and permanent residents of Canada. Moreover, the applicant cites some portions of a document of Citizenship and Immigration Canada:

> "The intent of R117(9)(d), R117(10) and R117(11) is to ensure that persons whom the sponsor made a conscious decision to exclude (either by not declaring and/or not having the persons examined) from their own application for permanent residence cannot later benefit by being sponsored by this same person as a member of the family class. […]
>
> The exclusion found in R117(9)(d) exists to encourage honesty and prevent applicants from circumventing immigration rules. Specifically, it exists to prevent applicants from later being able to sponsor otherwise inadmissible family members under the generous family class sponsorship rules when these family members would have prevented the applicant's initial immigration to Canada for admissibility reasons (i.e., excessive demand)."

[27] According to the applicant, paragraph 117(9)(d) of IRPR has two objectives: first to prevent misrepresentation by individuals to acquire a status or a privilege which was not otherwise available to them, and second to prevent applicants and their sponsors from circumventing the inadmissibility provisions in IRPR based on medical grounds.

[28] Therefore, the applicant claims that the visa officer was not reasonable when she relied on paragraph 117(9)(d) of IRPR to refuse the application because there was no finding of misrepresentation either on the part of the applicant or her spouse. The applicant had passed every medical examination that was required for her applications for a study permit and for permanent

residence. In fact, it would not have made a difference to the sponsor's application in that he would have successfully landed in Canada whether she was declared or not in his application.

[29] The applicant cites *De Guzman v. Canada (MCI)*, 2004 FC 1276, and argues that the court has ruled that subsection 25(1) of IRPA provides the necessary mechanism through which refused family members under paragraph 117(9)(d) of IRPR can have their cases fully reviewed.

[30] The applicant claims that the visa officer must take into account all relevant factors relating to an excluded relationship based on paragraph 117(9)(d) of IRPR when a decision is taken under subsection 25(1) of IRPA. In addition, the visa officer must provide adequate reasons and analysis as to why the exemption from subsection 117(9)(d) should not be allowed in a case of refusal.

[31] The applicant submits that the visa officer failed to consider the totality of the evidence that was before her when she refused the applicant's sponsorship application. She did not consider the circumstances in which the applicant was refused, the genuineness and the longevity of the relationship, the cultural differences respecting common law partnership in China, the couple's emotional and financial wellbeing, the fact that the applicant's sponsor is well established in Canada, and the devastating effects on the couple due to the prolonged separation.

[32] The applicant argues that *Li v. Canada (MCI)*, [2006] FC 1101, applies to this case. In that case, the Federal Court stated that the visa officer's decision did not show that any balancing was

done to determine whether, in the particular circumstances, the H & C factors existed to overcome paragraph 117(9)(d) of IRPR.

[33] The applicant also claims that the visa officer's decision is not reasonable for lack of adequate reasons citing *Baker*, above, *Via Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25, and *Mendoza v. Canada (MCI)*, [2004] F.C. 687. Adequate reasons in administrative decisions include:

(a) forcing decision-makers to focus on the issues and make better decisions;

(b) providing a basis for the parties to assess appeal options; and

(c) assisting the reviewing court in deciding whether an error has been made in first instance.

[34] The applicant cites, in particular *Via Rail*, above, at paragraph 22:

> "The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors."

[35] The applicant claims that the visa officer simply stated that she considered the applicant's requests based on H & C grounds and found that they were not sufficient to overcome paragraph 117(9)(d) of IRPR without giving any further detail.

[36] The applicant also argues that visa officer denied her right to procedural fairness by not giving her an opportunity to make her H & C submissions before refusing the application despite the repeated requests by the applicant. Moreover, it appears that a fairness letter had been sent to the applicant requesting further information to dissuade the visa officer from refusing the first application. It created a legitimate expectation on the part of the applicant. She believed she would be given the same opportunity to provide further information before the officer refused her application.

[37] The applicant submits that natural justice and procedural fairness would require that the applicant be given an opportunity to present her H & C submissions before her application was refused. The visa officer should not have ignored the express request from the applicant.

[38] The applicant also submits that the decision was rendered months before it was expected as the applicant, from previous experience, believed the decision would take approximately six months to be issued. Had the applicant known the decision was forthcoming she would have made her submissions to the visa officer much earlier.

[39] The applicant also cites the CIC guidelines with respect to the right to be heard.

[40] The applicant is seeking an order to have the decision of the visa officer quashed and the matter returned to a different visa officer for a new determination in accordance with the reasons of this Court, as well as an order for cost.

[41] The respondent claims that legislation does not require that the non-declared spouse has to be admissible. The legislation also does not require that the sponsor who did not report their relatives, did so with malicious or improper intent. This has been recognized throughout the case law concerning paragraph 117(9)(d) of IRPR. The sponsor is not required to commit a section 40 of IRPA misrepresentation in order to have their relative excluded under paragraph 117(9)(d) of IRPR.

[42] The respondent cites *Natt v. Canada (M.C.I.)*, [2005] F.C.J. No. 2119, *Azizi v. Canada (M.C.I.)*, [2006] 3 F.C.R. 118, 344 N.R. 174, *De Guzman* cited above , and de la *Fuente v. Canada (M.C.I.)*, [2006] F.C.J. No. 774.

[43] The respondent states that a person who is not a member of a family class under paragraph 117(9)(d) of IRPR has other available options provided to them to immigrate to Canada, including under H & C grounds. That option was chosen by the applicant but this application was denied.

[44] The respondent claims that the applicant totally failed to provide any submissions on the issue of the H & C application until after her case had already been refused, despite knowing that her file was actively being processed by the visa officer. The visa officer cannot be faulted for

rendering her decision before the applicant chose to send in her humanitarian and compassionate submissions on April 18, 2008, after the decision had been made.

[45] The respondent claims that the visa officer conducted a full analysis of the applicant's case under H & C grounds. In both the CAIPS notes and the visa officer's affidavit, she indicates the factors which she considered in coming to the conclusion that an exemption under subsection 25(1) of IRPA was not justified.

[46] The respondent states that the visa officer considered many factors in her reasons, such as the fact that the applicant's sponsor did not report his spouse, the findings of the IAD, the sponsor is a refugee from China, the applicant and her sponsor have been separated since their marriage except for one visit in Thailand, and the fact that their marriage is genuine. Despite these facts, the visa officer did not find the sponsor's excuse for not reporting his wife to be reasonable. It is argued that he ought to have known that the applicant was his common law wife since he had already lived in Canada for 2.5 years at the time of his landing.

[47] The respondent submits that this alone constitutes sufficient reasons on the part of the visa officer for denying the H & C application. Moreover, the submissions made by the applicant deal almost exclusively with the same factors that had already been considered on the visa officer's own initiative.

[48] The respondent cites *R. v. Sheppard*, [2002] 1 S.C.R. 869, and claims that the inadequacy of reasons is not a free-standing right of appeal, in that it automatically constitutes a reviewable error. The court held that the "requirements of reasons, in whatever context it is raised, should be given a functional and purposeful approach". Where the record as a whole indicates the basis upon which a trier of facts came to his or her decision, a party seeking to overturn the decision on the basis of the inadequacy of reasons must show that the deficiency in reasons has occasioned prejudice to exercise a legal right to appeal.

[49] The respondent claims that the applicant has failed to identify how the visa officer's reasons for her decision prejudiced her and that the test found in *Via Rail*, above, is respected. The reasons for the decision in this case have clearly satisfied the two purposes cited in *Via Rail*, above.

[50] Additionally, the respondent claims that the officer's reasons satisfy the standards enunciated by the Federal Court in *Mendoza*, above, and endorsed in *Nguyen et al. v. M.C.I.*, 2005 FC 349.

[51] The respondent claims that the officer did not deny the applicant procedural fairness. The applicant has not shown that she has any right to be forewarned of the timing of the decision. Further, the letter the applicant received never mentioned that her application would not be decided in less than 6 months.

[52] The respondent submits that the applicant was sent a fairness letter as part of her first permanent residence application. At the time of her second application, there was clearly no need to forewarn the applicant of this finding as the applicant had already been found twice to be inadmissible.

[53] Finally the respondent requests that this application for judicial review be dismissed.

[54] The applicant submits that the respondent erred in law for failing to understand the interplay between paragraph 117(9)(d) of IRPR and subsection 25(1) of IRPA. The respondent erred when he considered that some important facts are irrelevant to the refusal. These facts are as follow: the applicant is not a member of the family under paragraph 117(9)(d) of IRPR because she was not declared, the applicant was not medically inadmissible, neither the applicant nor her sponsor misrepresented themselves, and the omission to declare the applicant was an innocent mistake on the part of the sponsor.

[55] The applicant claims that the factors mentioned above along with those outlined in the applicant's submissions should have been carefully considered under subsection 25(1) of IRPA and that adequate and meaningful reasons should have been given to explain how the decision was made.

[56] Regarding the argument concerning the CAIPS notes, the applicant claims that it is not supported by the evidence or fact.

[57] The applicant submits that the CAIPS notes are merely summaries of the information in the couple's application forms. They do not contain an analysis of the H & C circumstances.

[58] Moreover, the applicant claims that the sponsor's failure to declare the applicant should not have been used to refuse the applicant's H & C application. Instead, the visa officer should have taken into consideration other issues which are beneficial to the applicant mentioned previously.

[59] The applicant also submits that the case *Sheppard*, above, does not apply to her case because the refusal was not supported by the evidence. Further, there is only an assumption of the visa officer to support the refusal.

[60] Regarding the arguments based on the cases *Via Rail*, above, and *Mendoza*, above, the applicant claims that the decision of the visa officer failed to meet the referenced legal tests for the same arguments outlined previously.

[61] Concerning the procedural fairness issue, the applicant restates that the visa officer violated procedural fairness when she prevented her from filing her H & C submissions, by prematurely refusing the application. Moreover, the visa officer was made fully aware of the pending H & C submissions by the applicant's request to be notified on the timing of the decision.

[62] The applicant states the unfairness of this decision, considering the enormous consequences on the couple's life

[63] There are two issues to be determined based on the applicant's submissions:

1. Was the decision of the visa officer reasonable, having regard to the circumstances of the applicant and a purposive reading of paragraph 117(9)(d) of IRPR and subsection 25(1) of the IRPA?
2. Was the applicant denied procedural fairness?

[64] I will indicate the standard of review for each question in my analysis.

[65] I will only discuss two grounds of all the arguments raised in the parties' submissions. The first ground is the lack of detailed reasons in the visa officer's decision. The second one is the procedural fairness. My analysis will start with a discussion concerning the standard of review.

[66] As mentioned by the applicant, *Baker*, above, and *Pushpanathan*, above, deal with the standard of review of both questions in my analysis. For the H & C factors, *Baker*, above, states that the standard of review is reasonableness. Regarding the issue of the procedural fairness, it is suggested to review the decision under the standard of correctness.

[67] There is an obvious lack of detailed reasons in the decision. *Baker*, above, and *Via Rail*, above, require the decision-maker to elaborate on the reasons of the decision. In *Baker*, the Supreme Court held at paragraph 43:

> "In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H & C decision to those affected, as with those at issue in Orlowski, Cunningham, and Doody, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached."

[68] In the letter dated April 7, 2008, before analyzing the H & C factors, the visa officer states that it is reasonable to expect that the applicant's sponsor, after living over two years in Canada, would have been aware of the definition of a common law partner or that he would have at least asked for clarification at the time of his own landing to verify if the applicant meets the definition. Then, she discusses the H & C factors, in the following manner:

> "Although I am satisfied that your relationship to your sponsor is genuine, I have reviewed the information submitted on the application ant the request for humanitarian and compassionate grounds presented and I do not feel that sufficient humanitarian and

> compassionate factors exist in this case to warrant an exemption of your inadmissibility under 117(9) (d) of the Regulations.
>
> As a result, I have determined that you are not a member of the family class."

[69] These are not enough detailed reasons and the decision does not meet the requirements of the cases cited previously. Therefore, the decision based on the H & C considerations is not reasonable.

[70] The issue concerning procedural fairness is not as clear as the previous one, but is still arguable. In *Baker*, above, the Supreme Court enumerates a non-exhaustive list of important factors to consider when evaluating the procedural fairness issue:

> (1) the nature of the decision being made and process followed in making it;
>
> (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
>
> (3) the importance of the decision to the individual or individuals affected;
>
> (4) the legitimate expectations of the person challenging the decision;
>
> (5) the choices of procedure made by the agency itself.

[74] First, the fact that the applicant and her sponsor received a fairness letter allowing them to provide submissions in the first application for sponsorship created a legitimate expectation. Moreover, their counsel sent a letter requesting to be informed when the decision was going to be

taken, so he could send the H & C submissions. The visa officer was aware of that but never responded to that request. While it is true that the applicant and her sponsor could have sent the submissions immediately instead of waiting for the fairness letter of the visa officer, this is not the process they expected in light of the request for submissions issued in the first application.

[71] In the decision of the Immigration Appeal Board, the member held that this case would be a particularly compelling case, in regards to the H & C factors based on cultural differences. The visa officer failed to adequately address this issue.

[72] Based on the standard of correctness, this decision lacks procedural fairness due to the previous factors stated above.

[73] I have purposely reviewed the submissions of both the applicant and the respondent as this is an example where the reviewing officers of the respondent failed to fulfill their functions.

[74] It was clearly stated by the Immigration Appeal Division on July 19, 2007 that the sponsor and the applicant could apply for relief under H & C grounds because the case was a compelling one.

[75] I have difficulty in understanding the reasons for the reviewing officers, once again, refusing the H & C application.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is granted and the matter is to be returned to a different visa officer for re-determination in accordance with these reasons.

No costs are awarded.

No question of general importance was submitted for certification.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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