Federal Court  Cour fédérale

Date: 20110608

Docket: IMM-6360-10

Citation: 2011 FC 656

Ottawa, Ontario, June 8, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

MENNO HENDRICK WIESEHAHAN,
CHUN YAN YANG

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a *de nova* appeal of a decision of the Immigration Appeal Division of the Immigration and Refugee Board (the Board), dated October 8, 2010, upholding a decision of a visa officer refusing the male applicant's application to sponsor the female applicant from China as a spouse, because the officer determined that the marriage was entered into in bad faith, contrary to the then-in-force section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

[2] Section 4 of the Regulations was amended between the date of the officer's determination and the Board hearing. The Board upheld the decision under the amended section 4(1) of the Regulations, the version in force as of the date of the hearing.

[3] The difference between the two provisions is that the former version mandated a conjunctive test for bad faith, in which the marriage had to be "not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act." (Emphasis added.) The current version of the test is disjunctive, requiring only one or the other of "not genuine or entered into primarily for the purpose of acquiring any status or privilege under the Act".

FACTS

Background

[4] The male applicant, Mr. Wiesehahan, is a 41 year-old citizen of Canada. The female applicant, Ms. Yang, is a 35 year-old citizen of China. On August 14, 2009, the male applicant applied to sponsor the female applicant from China as his spouse. Ms. Yang submitted an application for permanent residence in Canada, which was received on September 21, 2009. Neither applicant has been previously married nor does either have any children.

[5] The male applicant's father had spent a significant amount of time in China, including teaching at a middle school in Tianjin. The female applicant is a cousin of one of his father's former students, Sun Li. Because of this relationship, the male applicant's father had invited the female applicant to visit them in the summer of 2008. The male applicant's sister provided a letter of invitation in support of the female applicant's visitor's visa application. Included in the application

was a letter that said that the female applicant was going to be married to a boyfriend in China. The female applicant testified that at the time that she completed that application, her English was not good and she relied upon a friend to help with documentation. She stated that she had simply signed her name to the documents prepared for her. This first visa application was refused.

[6] In October of 2008, the male applicant accompanied his parents on a trip to China. The applicants first met on October 12, 2008, when the female applicant picked the male applicant and his parents up from the train station in Tianjin. The male applicant's parents had arranged to stay at Sun Li's house. Because Sun Li did not have enough space for the entire family in her apartment, she arranged for, the female applicant, her cousin, to host the male applicant in a spare bedroom in the apartment that she shared with her mother.

[7] The family arrived in Tianjin on a Sunday. The female applicant had arranged to take the Monday and Tuesday off work to show the male applicant around Tianjin while his parents were elsewhere. The male applicant testified that once they met and realized how much fun they had together, she arranged to take the rest of the week off work. Although she wanted to take the second week off, too, she was unable to get the time, but she was able to come home early every day so that they could spend the afternoons and evenings together. Moreover, because the family had arranged to spend the weekend prior to their return to Canada in Beijing, the applicants arranged for the female applicant to join the male applicant's family on the trip, so that they could spend more time together.

[8] In the male applicant's words, during the two weeks that he spent in China the applicants' relationship evolved tremendously:

> It happened gradually. I mean, the first few days it was I like you, then it was more, then it was I care about you and I want to see you more. By the end of the trip it was I don't want to leave, I don't want to be apart from her. And she felt, I know she felt the same way.

[9] By the time he left, the male applicant testified that "[a]t that point I would definitely have called her my girlfriend and although there never really was an official proposal I almost would have at that point called her a fiancée".

[10] The applicant testified that although there was no official marriage proposal, the equivalent of a proposal was made in emails dated the 11th and 12th of November, 2008. In those emails, the female applicant suggests that if she is unsuccessful in obtaining a visitor's visa to come to Canada, she and the male applicant should marry in China and then re-apply for a visa for her. She then asks the male applicant what he thinks, and whether he would like to marry her. In his responding email, the male applicant states that he agrees that if he is unable to get the visitor's visa arranged, then they should marry in China. He goes on to state that he wants to marry her and did not realize that it was still a question.

[11] In March of 2009, the female applicant submitted a second application for a visitor's visa. On that application, the female applicant had to list the names, addresses, and relationships of the people or institutions that she will visit. She lists the male applicant's father and his sister, both of whom she listed as "friend", but not the male applicant. The male applicant testified that he did not know why she did not include the male applicant's name. He stated that "as far as I can see it's

because I was a travelling companion rather than a destination of a visit." The male applicant testified that the purpose of her visit was to be for the applicants to travel around Canada and see how his family lived – therefore to stay with his sister and her family for several days, and to visit his parents. When asked why he had not been listed as her fiancé, the male applicant testified that his Member of Parliament had advised against it, stating that the application was more likely to be successful if it identified his sister as the female applicant's friend. This second visa application, too, was refused.

[12] The male applicant subsequently made two trips to China to visit the female applicant. On the first trip, they had a civil marriage in China, which was registered on June 10, 2009. Following the civil ceremony, they had a dinner with about 12 members of the female applicant's family. The second trip was in January 2010, when the couple took a vacation in Hainan, China.

[13] Throughout this period, the applicants exchanged numerous emails. The female applicant also corresponded with the male applicant's mother and sister.

Decision under review

[14] In 10 pages of reasons, the Board agreed with the visa officer's refusal of the female applicant's application for immigration to Canada.

[15] With regard to the applicant's burden of proof, the Board first considered whether the applicants had to demonstrate on a balance of probabilities both that their marriage was genuine and that it was not entered into for an improper purpose, or that their marriage was genuine or not entered into for an improper purpose. This decision turned, as described above, on whether the

applicable Regulations were those dated as of the date of the visa officer's determination or as of the date of the Board hearing.

[16] The Board concluded that the conjunctive test of the Regulations as they existed at the time of the Board hearing was applicable. However, as will be discussed below, the Board's ultimate decision was that neither element was met.

[17] The Board described the evidence that it was considering:

> ¶3. I have in evidence before me the Record, additional documentary disclosure from the appellant and the testimony of the appellant and his mother and father, in person and the applicant, by telephone….

[18] The Board reviewed the concerns that the visa officer had provided with regards to the initial refusal of their application:

> ¶3. …These include conclusions that; [sic] there was short courtship, the appellant and the applicant were together for only a brief period before and after the marriage, a lack of evidence of telephone communication, the emails submitted were substantially focused on matters involving a visa to Canada and that the marriage had not been consummated.

[19] The Board agreed with the visa officer that the female applicant's English is good enough that the applicants are able to communicate with one another in English.

[20] The Board held, however, that the applicants had failed to satisfy it that their marriage was genuine or had not been entered into primarily for the purpose of acquiring some status or privilege under the Act:

> ¶5. The testimony of the appellant and the applicant is substantially consistent; however, there are a number of aspects of the evidence before me that raise credibility concerns, both in relation to the genuineness of the marriage and the primary purpose component of the above referenced test.

[21] In particular, the Board was concerned about elements of the evidence regarding (1) the female applicant's visitor visa applications in May 2008 and March 2009; (2) the consummation of the applicants' marriage; and (3) the focus of the applicants' emails to one another.

[22] With regard to the temporary visa applications, the Board found that they revealed the following "significant discrepancies" between the evidence as presented at the hearing and as presented in the applications:

1. The May 2008 temporary visa application described the female applicant as having worked in the United Arab Emirates for about 6 months (from November 2003 to April 2004) as a "statistician" for an "accounting" business, but both applicants testified to the Board that she had worked in a restaurant.

2. The May 2008 temporary visa application states that the applicant intended to visit the male applicant's sister, while the applicants' testimony revealed that the intention was to visit the male applicant's father, but they felt that the visa would be more likely to be granted if they said otherwise.

3. The May 2008 temporary visa application includes a letter signed by the female applicant that appears to refer to the female applicant's intention to marry a former boyfriend. At paragraph 7, the Board found that the female applicant's explanation for this letter—that her friend helped her to write it and that she did not look at it before signing—was not credible, because (1) the female applicant's language training, which was sufficient to allow her to communicate with the male applicant, had all been completed by that time, and (2) the numerous references to a wedding and a boyfriend in the letter would allow even a "cursory" review by someone with "a limited knowledge of English" to discover its alleged inaccuracies. The Board concluded as follows:

   > On all of the evidence before me, I conclude that the applicant was aware of the contents of this letter and signed it in an effort to obtain a temporary visitor visa to Canada, through false representations.

4. The applicants both testified that they had decided to marry at least by November 2008. But in the female applicant's March 2009 visa application, she did not mention the male applicant. Moreover, the male applicant's sister was the only person who submitted a letter in support of the visa. The Board concluded that the applicants had not provided the real reason for this omission in their testimony before it:

> ¶11. … On the whole of the evidence before me, I conclude that the appellant and the applicant made a conscious decision not to mention the appellant, in the temporary visitor application in March 2009 and not to mention any intention to get married. The appellant has, in essence, acknowledged that omitting this pertinent information was designed to induce immigration authorities to issue a visa, without having the opportunity to consider the withheld information.

5. Overall, the Board concluded that the applicants' credibility was severely tarnished by these facts:

> ¶12. The manner in which the appellant, the applicant and the appellant's sister conducted themselves in relation to these temporary visa applications undermines their credibility, specifically in relation to attempts to obtain a visa for the applicant and each person was willing to falsify, withhold and "nuance" the information provided to the visa office to achieve this objective.

[23] With regard to the consummation of the marriage, the Board found that the fact that the applicants had not consummated their marriage was a relevant consideration, and found that the explanations for the lack of consummation were not credible.

[24] The applicants testified that in the area where the female applicant lives, and based on her family attitudes, the female applicant would be stigmatized if she married someone and then he left her to return to Canada. They stated that they were waiting to have their traditional wedding for the time when the two could live together continually. The male applicant's father, who had spent more time in the region than the male applicant, testified to confirm this understanding of attitudes to

marriage. The Board noted, however, that there was no expert evidence tendered regarding marriage traditions of the female applicant's home region.

[25] The Board found that even if traditions in the female applicants' region were as described, that did not explain why the applicants' own relationship had followed such a traditional trajectory. The Board found that the female applicant's life was not traditional in many ways:

> ¶23. There is no expert evidence before me regarding marriage customs in the Tianjin region of China. I accept that the applicant is from a village and that the village is likely more traditional than a city setting. The applicant's life has been far from a traditional, village one. She studied English in Malta and has had two trips to UAE, one to work in a restaurant, the second just as a holiday visit to friends, which is far from what a traditional village person would have experienced. She has had considerable contact with the appellant and his father and communicates frequently with the appellant by email and in English and demonstrates a sophisticated understanding of the visa applicant process, in relation to Canada. The applicant testified that "on average" married couples in her area will live together continually after the marriage. Yet, the experession "on average" affords the possibility fo the exception to the average situation and certainly her circumstance is exceptional. The appellant has not shown that she would be substantially stigmatized by following through with the traditional marriage to a person from another country and thus being separated for a period of time from her husband while his sponsorship of her is being processed. …

[26] The Board recognized that the jurisprudence is clear that consummation of a marriage is not in itself an indication that the marriage is not genuine or was entered into primarily to acquire any status or privilege under the Act. At paragraphs 17 to 21, the Board considered many of the cases submitted by counsel for the applicant in favour of this position. The Board found, however, that none of those cases prevented the Board from considering the consummation of the applicants' marriage as one factor in its consideration of their marriage:

> ¶18. Sexual relations between husband and wife are but one indicator of the genuineness of a marriage, not a precondition to a finding of genuineness and like all other indicators, the degree or existence of one factor does not preclude the finding that a marriage is genuine.
> …
> ¶20. I accept that how exactly a marriage will manifest itself, varies from culture to culture and even within one culture depending on the personalities of the individuals involved. However, the nature of interpersonal relations between spouses, including the existence or not of sexual relations is a factor to be considered in determining whether a marriage is genuine.

[27] In this case, the Board found that the applicants were, in fact, waiting for the female applicant to obtain a visa before they would truly be married.

> ¶22. It is unusual for a couple to marry and not consummate their marriage. Indeed, the applicant acknowledged that it is a rarity in her region for husbands and wives not to marry and then live together. It is evidence from what the appellant and the applicant told the visa officer that they only intended to have the traditional wedding ceremony after the applicant obtained her visa. According to the appellant, the applicant was the first person to tell him that she could not have sexual relations with him until there was both a traditional wedding ceremony and she could live with him, in essence until she was sponsored to Canada. …

[28] Moreover, the Board found that the applicants should not have been prevented from living together, because the male applicant could have moved to China. Indeed, the Board recognized that the male applicant had testified that he would do that should the female applicant fail to obtain a visa to Canada:

> ¶23. …According to the testimony before me, the appellant intends to travel to China in March 2011, regardless of the outcome of these proceedings and if the applicant is not granted a visa he will live with her in China, while reapplying. According to the appellant he has clear title to his home, which is worth a substantial amount of money. Given that he has been unemployed for the past two years,

> the option of living for a significant time in China with the applicant, was available to him. …

[29] As a result of these factors, the Board held that it was not satisfied that the marriage had been entered into in good faith:

> ¶23. … On the whole of the evidence before me, the fact that the appellant and the applicant have not celebrated their marriage in the traditional fashion and consummated their marriage undermines both the claim that the marriage is genuine and that it was not primarily entered into in order to acquire any status or privilege under the *Act*.

[30] Finally, the Board stated that the applicants' credibility was undermined by their history of "false information presented to the visa office, in relation to the temporary visa applications" and so the Board could not rely purely on their testimony of their love in order to find good faith:

> ¶24. …Given the appellant's involvement with false information presented to the visa office, in relation to the temporary visa applications, the appellant has not exhibited a degree of credibility that permits a conclusion that he is genuinely committed to this marriage. I simply do not know if he is head over heals in love, believing everything the applicant tells him, or whether he is involved in yet another fraudulent visa application. The applicant is far from the shy, traditional village woman that she has been portrayed as. She has extensively studied, worked and travelled for pleasure abroad. She has over three years of post secondary education and works as a chemistry lab technician.

[31] In the result, the Board concluded that the applicants had failed to meet their burden of proof:

> ¶25. Considering the misrepresentations in the temporary visa applications, the lack of credible explanations for non-consummation of the marriage, the fact that the emails are so focussed on immigration to Canada and credibility concerns in relation to both the appellant and the applicant, the appellant has not shown, on the balance of probabilities, either that the marriage was genuine or that it was not entered into primarily to acquire any status or privilege under the *Act* and the appeal is dismissed.

LEGISLATION

[32] Regulation 117(1)(a) of the Regulations defines which foreign nationals may be considered members of the spouse or common-law partner in Canada class:

117. (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	117. (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :
(*a*) the sponsor's spouse, common-law partner or conjugal partner;	*a*) son époux, conjoint de fait ou partenaire conjugal;
…	…

[33] Section 4 of the Regulations states that a foreign national will not be considered a spouse if the marriage was not genuine or was entered into primarily for the purpose of acquiring immigration status:

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	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) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or	a) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;
(b) is not genuine.	b) n'est pas authentique.
. . .	. . .

ISSUES

[34] The applicants raise the following issues in their submissions:

1. Whether the Board made an unreasonable credibility assessment and improperly analyzed the evidence before it?
2. Whether the Board erred by ignoring corroborating evidence that supported a finding that the marriage was genuine?
3. Whether the Board erred by considering the application under the new Regulations.

STANDARD OF REVIEW

[35] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, per Justice Binnie at paragraph 53.

[36] Questions of natural justice and the duty to act fairly are questions of law to be determined on the standard of correctness: *Kozak v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, at paragraph 44; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 55 and 90; and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 43. However, a breach that was purely technical or resulted in no substantial wrong or miscarriage of justice, or where the result would not differ upon reconsideration, will not invalidate the decision: *Khosa* at paragraph 43, *Yassine v. Canada (Minister of Employment & Immigration)*, [1994] F.C.J. No. 949 (Fed. C.A.), *Gale v. Canada (Treasury Board)*, 2004 FCA 13.

[37] Questions of credibility and of the genuineness of a marriage are questions of fact to be determined on a standard of reasonableness: see, for example, my decisions in *Akinmayowa v. Canada (Citizenship and Immigration)*, 2011 FC 171, at paragraph 18, and *Yadav v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 140, at paragraph 50, and the other decisions cited therein.

[38] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, supra, at paragraph 47; *Khosa*, supra, at paragraph 59.

ANALYSIS

Issue No. 1: Did the Board make an unreasonable credibility assessment and improperly analyze the evidence before it?

[39] The applicants submit that the Board erred by failing to make clear or reasonable credibility findings. The applicants submit that the Board's reasons do not reveal what evidence the Board was accepting versus rejecting as not credible. Furthermore, the applicants submit that where the Board did make credibility findings, these failed to consider all of the evidence. In particular, the applicants submit that the Board made the following erroneous credibility determinations:

1. The Board found that the letter attached to the first visa application undermined the female applicant's credibility because it referred to the female applicant being married to a boyfriend. The applicants submit that the Board ought to have considered the female applicant's explanation that a friend prepared the letter and that she did not look it over closely.

2. The Board found that the fact that the second visa application did not mention the male applicant undermined the credibility of both applicants. The applicants submit

that the Board's conclusion that the male applicant's explanation was "spur of the moment" was contradicted by the male applicant's sisters statutory declaration, which contained the same explanation—namely, that the male applicant was seen as her travelling companion and not a "destination."

3. The Board similarly failed to consider the applicants' explanation as to why they had not mentioned the marriage in the second visa application—namely, because a Member of Parliament had so advised.

4. The Board rejected the explanations given by the applicants and the male applicant's father regarding the non-consummation of the marriage. The Board should not have required expert evidence beyond that tendered by the applicants and the male applicant's father. The Board ought to have positively assessed the applicants' evidence in this regard because they were candid about it.

5. The Board states in its conclusion that it also finds the emails between the applicants to be focussed on immigration. This is not supported by the evidence.

[40] The respondent submits that the Board's findings were reasonable and the applicants are merely asking this Court to reweigh evidence.

[41] The Court agrees with the respondent. The Board made clear credibility findings against the applicants. The Board held that the applicants had failed to provide explanations that satisfied it regarding its concerns in their application. The Board specifically considered each of the items impugned by the applicants. With regard to the female applicant's explanation for the letter accompanying her first visa application, the Board found that her English was good enough at that time for her to have read over the letter, and that the letter was simple enough that even a cursory knowledge of English would have highlighted its false claims regarding a boyfriend and marriage. The Board considered the applicants' and the male applicant's sister's explanation as to why they did not include the male applicant in the second visa application. The Board stated that they had themselves admitted that they omitted his mention because they thought their application would be more likely to succeed if they did so. This was an admitted misrepresentation by omission. The

Board was reasonable in finding that their credibility was therefore undermined. The Board also considered the evidence regarding non-consummation of the marriage, but found that the explanations were not credible because the female applicant is not a typical traditional village woman, and because the male applicant is able to live with the female applicant in China. This conclusion was reasonably open to the Board. The applicants were married in a civil ceremony, were 40 and 35 years old respectively, and were travelling and living together. It was reasonably open for the Board to find their explanation for non-consummation not credible.

[42] The Board does not deal with the emails between the applicants in any detail. While the applicants have demonstrated that there is a lengthy correspondence between the applicants and that much of it does not relate to immigration matters, the Board was reasonable in finding that many of the most probative emails do include immigration concerns. For example, the Board quotes the emails that the applicants testified constitute their decision to marry, and finds that these emails indicate that marriage is contingent upon the female applicant's successful visa application.

Issue No. 2: Whether the Board erred by ignoring corroborating evidence that supported a finding that the marriage was genuine?

[43] The applicants submit that the Board erred by failing to consider corroborating evidence provided by the applicants regarding the good faith of their marriage. In particular, the applicants state that the following evidence was not considered in the Board's decision:

1. Live testimony from the male applicant's parents regarding the good faith of the applicants' marriage. The Board heard testimony from both parents who stated that they had seen the couple together and were certain that the marriage was genuine. The male applicant's mother also testified as to the preparations that her son was making in anticipation of the arrival of the female applicant, and submitted into evidence numerous emails between herself and the female applicant. Finally, the parents, upon being questioned on the point by the Board, specifically affirmed that they did not believe that their daughter-in-law is only interested in marriage as a

means to come to Canada, explaining that she had never seemed to want to immigrate, but clearly wanted to be with their son;

2. A letter from Sun Li, the female applicant's cousin, dated February 27, 2010, in which the cousin affirms that based upon her observations of the couple while they were in China, for example at their marriage dinner, and based upon her observations of her cousin's preparations, she believes that their marriage is genuine;

3. A letter from Gao Kai, an English teacher at the middle school in Tianjin where the male applicant's father had worked. The letter explains Mr. Gao's relationship with the male applicant's father, describes how Mr. Gao knows both applicants, and expressed Mr. Gao's hope that they "will soon realize their dreams too and live together happily for ever.";

4. Photographs of the applicants together; and

5. A statutory declaration from the male applicant's younger sister, dated September 9, 2010, in which she explains why the temporary visa applications were completed by her in the manner in which they were.

[44] The applicants submit that the Board erred by focusing only upon the problems that it found with the two visitor's visa applications rather than focusing on the large amount of evidence before it regarding the good faith marriage between the applicants.

[45] The respondent submits that the Board is presumed to have considered all of the evidence, and that its reasons are clearly supported by the evidence that it considered. The respondent submits that the applicant is merely contesting the weight given to the evidence by the Board.

[46] The Court agrees with the respondent that the Board need not mention every piece of evidence, but need only refer to those pieces of evidence that are relevant, either in support of or contrary to its decision. In this case, the Board stated that it had before it the testimony of the male applicant's parents, as well as the additional documentary disclosure provided by the applicants.

[47] The applicants have provided this Court with a series of cases in which the relevancy of the testimony of family members is affirmed, where appropriate. In those cases, however, the Board refused to hear the family members' testimony at all. In this case, the Board allowed the testimony of all witnesses put forward by the applicants. The Board specifically referred to the male applicant's father's evidence regarding marriage customs in Tianjin.

[48] Nevertheless, the Board concluded that the marriage was not genuine. While the Board did not expressly reject the testimony from family members and the teacher in China that the marriage was genuine, the Court can clearly infer such rejection from the Board's reasons. The Board found that the marriage was not genuine because the applicants, including the male applicant's younger sister, had been willing to evade the truth in previous visa applications for the female applicant, and because of the applicants' own testimony regarding their marriage with respect to emails and failure to consummate. The evidence referred to by the applicants refutes neither of these conclusions.

[49] Similarly, the letters from the female applicant's cousin and from Gao Kai, and the pictures of the applicants together, do not undermine the reasonableness of the Board's decision. The Board accepted the applicants' story regarding how they had met, how often they had visited one another, and their correspondence with one another. The Board found, however, that this relationship was one that was not a genuine marriage and was entered into primarily to attain a benefit or privilege under the Act. The applicants have not pointed to any evidence that the Board overlooked that speaks to this finding.

<u>Issue No. 3</u>: Did the Board err by considering the application under the new Regulations?

[50] The Board stated that it was considering the applicants' claim under the new section 4 of the Regulations – a section that had been amended between the time of the applicants' application and the Board hearing.

[51] As described above, the section as it existed at the time of the applicants' application provided a conjunctive test for bad faith in a marriage:

> 4. For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.

[52] In contrast, the section as it existed at the time of the Board hearing provided a disjunctive test for bad faith in a marriage:

> 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.

[53] The Board stated that because Board hearings are *de novo* appeals as opposed to a review the new Regulations should apply.

[54] In this case, the Board found that the applicants failed to satisfy the Board that their marriage was genuine or that their marriage had not been entered into primarily for the purpose of

acquiring status in Canada. Accordingly, this issue is only relevant if this application for judicial review is allowed and referred back to another panel of the Board for redetermination. Since the Court has concluded the Board's decision in this case was reasonably open to the Board, this application will be dismissed. Accordingly, this issue is not relevant in this application.

CONCLUSION

[55] For these reasons, the Court concludes that the Board's decision in this case was reasonably open to it and this application for judicial review must be dismissed.

CERTIFIED QUESTION

[56] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	*Menno Hendrick Wiesehahan, Chun Yan Yang v. The Minister of Citizenship and Immigration*
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APPEARANCES:

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