

Federal Court



Cour fédérale

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Date: 20111221

Docket: IMM-246-11

Citation: 2011 FC 1476

Ottawa, Ontario, this 21st day of December 2011

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

LU, Hsueh-Wan

Applicant

and

MINISTER OF CITIZENSHIP  
AND IMMIGRATION

Respondent

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application by Hsueh-Wan Lu (the applicant) under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of a decision by Jennifer Wu, visa officer at the Canadian Trade Office in Taipei (the officer). The officer refused the applicant's application for a permanent resident visa based on paragraph 36(1)(b) of the Act, characterizing the applicant as inadmissible on grounds of serious criminality.

[2] The applicant is the president and owner of Lien Chan Transport Affiliated Enterprise (the business) located in Taiwan. In March 2010, Quebec selected him as an “Investor” immigrant and sent him a selection certificate. On June 2, 2010, he applied for a permanent resident visa. With his application, he attached a summary criminal judgment from the district of Taoyuan court in Taiwan dated July 30, 2009 (the judgment). The judgment found him guilty of the following offence: “in the performance of his occupation negligently killed another by neglecting the degree of care required by such occupation”. This offence is related to the death of one of his employees in 2008 as a result of a workplace accident during a delivery for his business. As the person responsible for the business under the *Labour Safety and Health Law* in the Republic of China, the applicant acknowledged his negligence and pleaded guilty. A summary judgment was issued, his sentence was suspended and he was sentenced to only a fine.

[3] Upon reviewing his application, the visa officer at the Canadian Trade Office in Taipei rejected it because of the criminal judgment issued against him in Taiwan; the officer considered the applicant inadmissible under paragraph 36(1)(b) of the Act on grounds of serious criminality.

\* \* \* \* \*

[4] In his decision dated November 16, 2010, the officer found that the offence committed by the applicant in Taiwan would, if committed in Canada, constitute criminal negligence under sections 217.1, 219 and 220 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the *Criminal Code*), an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least

10 years (paragraph 36(1)(b) of the Act). Consequently, the officer rejected the visa application pursuant to subsection 11(1) of the Act.

[5] The entries in the Computer Assisted Immigration Programming System (CAIPS) that are part of the officer's decision indicate that the officer compared the applicant's conviction in China to the equivalent offence in Canada.

[6] The officer found that, since the applicant had not adopted the safety measures required to prevent the March 2008 accident, he had breached his duty, thus satisfying the elements of the offence of criminal negligence under section 219 of the *Criminal Code*.

\* \* \* \* \*

[7] The relevant sections of the Act are as follows:

Application before entering Canada

**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 requirements of this Act.

Visa et documents

**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.

Serious criminality

**36.** (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

Grande criminalité

**36.** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants:

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

[8] The following sections of the Republic of China's *Labour Safety and Health Law* are also relevant:

*Labour Safety and Health Law*

Necessary safety & health equipment & facilities

**5(1)(4)** It is the responsibility of the employer to provide the necessary safety and health installations in conformity with established standards for the following purposes:

IV. To prevent the risk of injury encountered in the course of quarrying, excavating, loading and unloading, transportation, stockpiling, and logging.

**28(2)(1)** When a workplace of an enterprise experiences one of the following types of occupational accidents, it is the responsibility of the employer to report the accident within 24 hours to the appropriate inspection agency:

1. An accident involving death.

**31(1)** Anyone found to be in violation of Article 5, Paragraph 1 or Article 8, Paragraph 1, and whose actions led to an occupational accident as described in Article 28, Paragraph 2, Subparagraph 1 shall be subject to no more than three years in prison or detention, or fines not in excess of NT\$150,000, or both. When a legal entity violates any of the above-mentioned provision, in addition to punishing the person in charge, the legal entity will be penalized with the fines listed above.

[9] In addition, the following section of the *Criminal Code of the Republic of China* is also pertinent:

**276(2)** A person who in the performance of his occupation commits an offence specified in the preceding paragraph by neglecting the degree of care required by such occupation shall be punished with imprisonment for not more than five years, or detention; in addition thereto, a fine of not more than 3,000 Silver Dollars may be imposed.

[10] The following sections of the *Criminal Code* are germane to assessing the equivalence of the offences committed in Taiwan:

Duty of persons directing work

**217.1** Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Obligation de la personne qui supervise un travail

**217.1** Il incombe à quiconque dirige l'accomplissement d'un travail ou l'exécution d'une tâche ou est habilité à le faire de prendre les mesures voulues pour éviter qu'il n'en résulte de blessure corporelle pour autrui.

Criminal negligence

**219.** (1) Every one is criminally negligent who

(a) in doing anything, or

Négligence criminelle

**219.** (1) Est coupable de négligence criminelle quiconque:

a) soit en faisant quelque chose;

(b) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

Definition of “duty”

(2) For the purposes of this section, “duty” means a duty imposed by law.

Causing death by criminal negligence

**220.** Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

b) soit en omettant de faire quelque chose qu’il est de son devoir d’accomplir,

montre une insouciance déréglée ou téméraire à l’égard de la vie ou de la sécurité d’autrui.

Définition de « devoir »

(2) Pour l’application du présent article, « devoir » désigne une obligation imposée par la loi.

Le fait de causer la mort par négligence criminelle

**220.** Quiconque, par négligence criminelle, cause la mort d’une autre personne est coupable d’un acte criminel passible:

a) s’il y a usage d’une arme à feu lors de la perpétration de l’infraction, de l’emprisonnement à perpétuité, la peine minimale étant de quatre ans;

b) dans les autres cas, de l’emprisonnement à perpétuité.

\* \* \* \* \*

[11] Following the hearing before me, the applicant’s new counsel essentially raised the following issue:

[TRANSLATION]

Did the officer err by finding that the offences committed by the applicant in Taiwan are equivalent to the offence of criminal negligence in Canadian criminal law?

[12] The standard of review applicable to an officer's determination of equivalency is reasonableness (*Abid v. Minister of Citizenship and Immigration*, 2011 FC 164 at paragraph 11 [*Abid*]; *Sayer v. Minister of Citizenship and Immigration*, 2011 FC 144 at paragraph 4 [*Sayer*]). The determination of equivalency is a question of mixed fact and law that attracts deference (*Abid* at paragraph 11 and *Sayer* at paragraph 5). Equivalency is a mixed question because, first, the applicant must prove the foreign law, which becomes a question of fact (*Lakhani v. Minister of Citizenship and Immigration*, 2007 FC 674 at paragraph 22; *Sayer* at paragraph 4). Once the foreign law is established, an officer must assess the relevant facts of the case according to the terms of the foreign law in comparison with the applicable Canadian federal law (*Sayer* at paragraph 5).

[13] This Court must therefore determine whether the officer's finding is justified, transparent and intelligible and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47 [*Dunsmuir*]).

\* \* \* \* \*

[14] With respect to the issue raised, the respondent correctly summarizes the equivalency analysis that an officer must conduct in assessing whether the offence for which the applicant was convicted in Taiwan would, if committed in Canada, "constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years" (paragraph 36(1)(b) of the Act). As summarized in *Hill v. Minister of Employment and Immigration* (1987), 73 N.R. 315 at page 320 (F.C.A.), equivalency between offences can be determined in three ways:

. . . first, by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences. Two, by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not. Third, by a combination of one and two.

[15] *Li v. Canada (Minister of Citizenship and Immigration) (C.A.)*, [1997] 1 F.C. 235, [*Li*]

clarifies this determination of equivalency by stating that an officer must look at the similarity of definition of the two offences, i.e., “if it involves similar criteria for establishing that an offence has occurred, whether those criteria are manifested in ‘elements’ (in the narrow sense) or ‘defences’ in the two sets of laws” (at paragraph 18). In Justice Strayer’s view, at paragraph 19,

[a] comparison of the “essential elements” of the respective offences requires a comparison of the definitions of those offences including defences particular to those offences or those classes of offences.

[16] It is not necessary to compare the criminal procedure in the two systems: the offences must be compared, not the possible convictions (*Li* at paragraph 18).

[17] In this case, I am of the view that the officer did not err in his determination of equivalency: the officer reviewed the foreign and Canadian provisions and focused on the essential elements of the offences, applying them to the underlying facts of the Taiwanese offence. In applying the appropriate test, the officer noted the following facts:



- The applicant was the person responsible for the business and was the employer as defined in the Republic of China's *Labour Safety and Health Law*;
- In March 2008, one of his employees died in the performance of his duties: a metal box slipped off a trailer and crushed him while he and his co-workers were unloading equipment;
- The applicant failed to adopt the safety standards required under the *Labour Safety and Health Law*;
- Since he was the employer and the person responsible, the applicant was guilty of two criminal offences under sections 31(1), 5(1)(4) and 28(2)(1) of the Republic of China's *Labour Safety and Health Law* as well as section 276(2) of the *Criminal Code of the Republic of China*;
- If committed in Canada, these offences would be equivalent to the duty of a person who supervises work and criminal negligence under sections 217.1, 219 and 220 of the Canadian *Criminal Code*;
- These offences are punishable by a maximum term of imprisonment for life.

[18] The table below identifies the essential elements of each of the offences (emphasis added):

*LABOUR SAFETY AND HEALTH LAW*

NECESSARY SAFETY & HEALTH EQUIPMENT  
& FACILITIES

**5(1)(4)** It is the responsibility of the employer to provide the necessary safety and health installations in conformity with established standards for the following purposes:

IV. To prevent the risk of injury encountered in the course of quarrying, excavating, loading and unloading, transportation, stockpiling, and logging.

**31(1)** Anyone found to be in violation of Article 5, Paragraph 1 or Article 8, Paragraph 1, and whose actions led to an occupational accident as described in Article 28, Paragraph 2, Subparagraph 1 shall be subject to no more than three

*CRIMINAL CODE OF CANADA*

DUTY OF PERSONS UNDERTAKING ACTS

**217.1** Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

CRIMINAL NEGLIGENCE

**219.** (1) Every one is criminally negligent who

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

years in prison or detention, or fines not in excess of NT\$150,000, or both.

When a legal entity violates any of the above-mentioned provision, in addition to punishing the person in charge, the legal entity will be penalized with the fines listed above.

*Criminal Code of the Republic of China*

**276(2)** A person who in the performance of his occupation commits an offence specified in the preceding paragraph by neglecting the degree of care required by such occupation shall be punished with imprisonment for not more than five years, or detention; in addition thereto, a fine of not more than 3,000 Silver Dollars may be imposed.

Definition of “duty”

(2) For the purposes of this section, “duty” means a duty imposed by law.

Causing death by criminal negligence

**220.** Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

[19] Considering the elements of the offences identified above and the summary judgment stating that the applicant was guilty of “in the performance of his occupation negligently killed another by neglecting the degree of care required by such occupation”, it was not unreasonable for the officer to find that the applicant would have showed “wanton or reckless disregard for the lives or safety of other persons” if the offence had been committed in Canada (subsection 219(1) of the *Criminal Code*).

[20] Contrary to the applicant’s arguments, wanton or reckless disregard does not require an element of intention (*R. v. Scrocca*, 2010 QCCQ 8218 at paragraph 62 [*Scrocca*]). Such disregard is established if the applicant acted in a manner that represents a marked departure from the norm, from the conduct of a reasonably prudent person in the circumstances (*R. v. Morrissey*, [2000] 2

S.C.R. 90 at paragraph 19; *R. v. Anderson*, [1990] 1 S.C.R. 265 at paragraph 11). Thus, [TRANSLATION] “the [applicant’s] intentions, what he knew or did not know, are not taken into consideration. In a criminal negligence case, the criminal fault lies in ‘failure to direct the mind to a risk which the reasonable person would have appreciated’” (*Scrocca* at paragraph 65).

[21] In this case, there is no doubt that the officer believed that the applicant’s conduct in failing to adopt safety standards represented a marked departure from the reasonable diligence standard set out in the Republic of China’s *Labour Safety and Health Law*: the applicant was guilty of “in the performance of his occupation negligently killed another by neglecting the degree of care required by such occupation”.

[22] Accordingly, it was reasonable for the officer to consider criminal negligence in Canadian law, as defined in sections 219 and 220 of the *Criminal Code*, as equivalent to the offence that the applicant was convicted of in Taiwan. This determination of equivalency was justified, transparent and intelligible and “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir* at paragraph 47).

[23] Moreover, section 217.1 of the *Criminal Code* is an amendment to the *Criminal Code* under *An Act to amend the Criminal Code (criminal liability of organizations)*, S.C. 2003, c. 21, whose goal is to ensure the safety of employees in the workplace and to modify the liability scheme of corporations (*Scrocca* at paragraph 106). This section does not in itself create an offence (*Scrocca* at paragraph 107). Section 217.1 of the *Criminal Code* [TRANSLATION] “confirms the duty imposed on every one who directs work to take reasonable steps to ensure the safety of others. It makes it easier

to prove charges of criminal negligence against corporations or organizations although the meaning of the term “every one” extends the scope of this provision to all persons” (*Scrocca* at paragraph 107).

[24] Given the scope of this provision, it was, therefore, reasonable for the officer to refer to it in his decision.

[25] Thus, the officer did not err by considering criminal negligence under sections 217.1, 219 and 220 of the *Criminal Code* as equivalent to the offence that the applicant committed in Taiwan. His decision to reject the applicant’s visa application was reasonable: if the offence were committed in Canada, it would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

\* \* \* \* \*

[26] For the foregoing reasons, the application for judicial review is dismissed.

[27] Counsel for the applicant proposed the following questions for certification:

1. Do the words, “shows wanton or reckless disregard” / « montre une insouciance déréglée ou téméraire », in subsection 219(1) of the *Criminal Code* create a Canadian defence to criminal negligence not deemed to exist in foreign jurisdictions and which, in making a determination of equivalency, the Designated Immigration Officer must reasonably:
  - i. determine was available to a person in the foreign jurisdiction at the relevant time; or
  - ii. conclude, on the facts, the person would not have been able to raise in Canada?

2. Can a determination of equivalency reasonably be made between an offence under an Act of Parliament and a foreign offence where, on the facts, the act(s), or act(s) giving rise to conviction, of a person outside Canada, would have been within the exclusive jurisdiction of a province or territory and not Parliament had they taken place inside Canada?

[28] In *Liyanagamage v. Minister of Citizenship and Immigration* (1994), 176 N.R. 4, the Federal Court of Appeal set out the following criteria with respect to subsection 83(1) of the *Immigration Act*, now replaced by paragraph 74(d) of the *Immigration and Refugee Protection Act*:

In order to be certified pursuant to subsection 83(1), a question must be one which, in the opinion of the motions judge, transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application (see the useful analysis of the concept of "importance" by Catzman J. in *Rankin v. McLeod, Young, Weir Ltd. et al.* (1986), 57 O.R. (2d) 569 (Ont. H.C.)) but it must also be one that is determinative of the appeal. The certification process contemplated by section 83 of the *Immigration Act* is neither to be equated with the reference process established by section 18.3 of the *Federal Court Act*, nor is it to be used as a tool to obtain from the Court of Appeal declaratory judgments on fine questions which need not be decided in order to dispose of a particular case.

[29] With regard to the first proposed question, the reformulation of methods already established to assess criminal equivalence is not disputed. I therefore concur with the written representations of counsel for the respondent who is opposed to the certification of this question.

[30] The second proposed question is not relevant in any way to the decision at issue and is therefore not determinative. The officer in this case did not find that the applicant was inadmissible

under paragraph 36(2)(b) of the Act but under paragraph 36(1)(b) of the Act. The question is therefore purely hypothetical.

[31] Accordingly, there is no question for certification.

**JUDGMENT**

The application for judicial review of the decision by a visa officer at the Canadian Trade Office in Taipei refusing the applicant's application for a permanent resident visa based on paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, is dismissed.

“Yvon Pinard”

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Judge

Certified true translation  
Mary Jo Egan, LLB

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-246-11

**STYLE OF CAUSE:** LU, Hsueh-Wan v. MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Montréal, Québec

**DATE OF HEARING:** October 18, 2011

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

**DATED:** December 21, 2011

**APPEARANCES:**

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