

Federal Court



Cour fédérale

Date: 20130617

Docket: IMM-8435-12

Citation: 2013 FC 666

Ottawa, Ontario, June 17, 2013

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Applicant

and

WEI HONG XIE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Minister of Citizenship and Immigration (the applicant) seeks judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *Act*) of the August 1, 2012 decision of the Immigration Appeal Division of the Immigration and Refugee Board (the Board) which allowed the appeal by Ms Xie (who was then the appellant) of the decision of a Visa Officer (the Officer) at the Office of the Consulate General of Canada in Hong Kong, dated October 8, 2009. The Officer refused to issue a permanent resident visa to the appellant's spouse,

Mr Liang. As the Minister has applied to review the appeal decision of the Board, Ms Xie is the respondent in the present proceeding.

Background

[2] Ms Xie (the respondent) was sponsored to come to Canada by her first husband and she obtained permanent residence on December 15th, 1999. The marriage ended in 2002 due to her husband's extra-marital affair. Ms Xie then had a common-law relationship that also ended due to her partner's affair. After this relationship ended Ms Xie discovered she was pregnant with her son, who was born in February 2004.

[3] Ms Xie had returned to China for a family visit in 2003. While delivering a parcel on behalf of her Canadian roommate, she met Mr Liang. Following her return to Canada, she and Mr Liang spoke on the phone frequently. In November of 2004, Mr Liang proposed to Ms Xie by telephone. They were married in China on January 19, 2005. Ms Xie and her son visited Mr Liang on four separate occasions in China, including for a period of one year in 2005-2006 and for other periods of up to three months.

[4] Since their marriage, Ms Xie attempted to sponsor her husband's application for permanent residence three times and on each occasion the visa was refused.

[5] On the third sponsorship application, Mr Liang admitted to relying on two pages of preparatory material, referred to by the Officer as "cheat sheets". The Officer refused Mr Liang's permanent residency on two grounds: pursuant to subsection 4(1) of the *Regulations*, that the

marriage was not genuine and was entered into primarily for the purpose of Mr Liang gaining entry into Canada; and, pursuant to paragraph 40(1)(a) of the *Act*, that the applicant was inadmissible for misrepresentation due to the reliance on the so-called “cheat sheets”.

[6] Ms Xie appealed the decision to the Immigration Appeal Division of the Immigration and Refugee Board (the Board). The Board allowed the appeal and concluded that Ms Xie and Mr Liang did indeed have a genuine marriage.

[7] The Minister of Citizenship and Immigration (the applicant) now seeks judicial review of the decision of the Board.

Decision under review

[8] The Board conducted a detailed review of the oral and documentary evidence and concluded that Mr Liang and Ms Xie had “been in a genuine, exclusive and committed marital relationship since they married on January 19, 2005, being a period in excess of seven and one-half years.”

[9] The Board noted several factors in support of the genuineness of the marriage. With respect to the so-called “cheat sheets”, the Board found no evidence that they were used for an improper purpose, and that it was reasonable for Mr Liang to prepare for his interview given that he had been refused twice previously. The Board also found that Mr Liang was nervous, and that he had a faulty memory, which was corroborated to some extent in the affidavit of his niece.

The Issues

[10] The key issue is whether the Board failed to consider essential evidence in determining that the marriage was genuine.

[11] The applicant in these proceedings, the Minister of Citizenship and Immigration, submits that the Board's decision is not reasonable because the Board failed to assess the credibility of Ms Xie and Mr Liang, ignored evidence, and failed to reconcile the multiple inconsistencies in the evidence that were material to the burden upon Ms Xie and Mr Liang to establish that they had a genuine marriage. In addition, the Board unreasonably accepted the reason for the use of the "cheat sheets" as due to Mr Liang's nervousness and poor memory without sufficient evidence to support such conditions.

[12] The respondent in these proceedings, Ms Xie, submits that the Board considered all the evidence, fully reviewed the three failed sponsorship decisions and visa refusals, addressed the inconsistencies in the evidence, found them to be minor, and weighed them against the other evidence which supported that this was a genuine marriage.

[13] With respect to the "cheat sheets", the respondent submits that these were analogous to the preparation that counsel would undertake in a face-to-face meeting with a client, and in this case, due to the fact that Mr Liang was in China and did not speak English, the written material was an appropriate alternative.

Standard of Review

[14] The applicant and respondent agree that the applicable standard of review of the decision of the Board is reasonableness which calls for deference.

[15] The role of the Court on judicial review is not to substitute any decision it would have made but to “determine if the outcome ‘falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law’: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47. There may be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome”: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1SCR 339 at para 59.

[16] As noted by Justice Scott in *Canada (Minister of Citizenship and Immigration) v Pierre*, 2012 FC 1169:

[9] A decision on the genuineness and nature of a relationship under section 4 of the IRPR is essentially based on facts, such that this type of decision is subject to the reasonableness standard (*Kaur v Canada (Minister of Citizenship and Immigration)*, 2010 FC 417, [2010] FCJ No 482, at para 14; *Zheng v Canada (Minister of Citizenship and Immigration)*, 2011 FC 432, [2011] FCJ No 544, at para 18).

[10] Further, “It is established law that an appeal before the IAD is an appeal *de novo* (*Provost v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1310, 2009 FC 1310, [2009] FCJ No 1683 (QL), at para 25). Thus, the applicant must persuade the IAD, and not the Court, that the marriage is genuine or was not entered into primarily for the purpose of gaining status under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). This Court’s jurisdiction is relegated to that of review and it is not to tamper with the IAD’s discretion if that discretion was reasonably exercised” (see

Ma v Canada (Minister of Citizenship and Immigration), 2010 FC 509, 368 FTR 116, at para 32).

Did the Board err by failing to consider essential evidence?

[17] The applicant Minister noted that the Board failed to consider the inconsistent testimony regarding when the couple began to communicate by phone, when Mr Liang first met Ms Xie's mother, whether he brought gifts to that meeting, whether they stayed with Ms Xie's mother on her recent visit to China, and why Mr Liang did not know the name of Ms Xie's son's biological father. The applicant also questioned whether the phone records provided to support Ms Xie and Mr Liang's assertion of frequent phone calls were scrutinised by the Board (suggesting that the phone records did not indicate who the calls were to or from, only that they were from Canada to China).

[18] I do not agree that the Board ignored the inconsistent evidence. For example, the Board commented on the discrepancy in the dates of the first meeting of Ms Xie's mother, noting that "[t]he conflicts in evidence such as the date when the applicant first met the appellant's mother and the date on which they first spoke to each other do not, having regard to the totality of the evidence, significantly detract from the positive factors relating to the genuineness of the marriage."

[19] With respect to Mr Liang's knowledge of the name of Ms Xie's former common-law spouse and father of her son, the Board noted that while Mr Liang did not know the man's name, he was aware of the reasons for the break-up and his evidence corroborated Ms Xie's testimony that he encouraged her to keep her baby when she found out she was pregnant.

[20] Similarly, the Board noted the minor conflict regarding whether the couple stayed with Ms Xie's mother in China and accepted Mr Liang's explanation. The Board noted, in addition, that what was important was that the evidence showed that Mr Liang visits his mother-in-law, i.e. that they have a relationship.

[21] The applicant Minister submits that the "cheat sheets" used by Mr Liang to prepare for the interview demonstrate that the marriage was not genuine as married persons would not need to be reminded of such basic information. The applicant submits that the Board's acceptance of the need for the cheat sheets was unreasonable and that this led to other unreasonable findings. The Board unreasonably accepted the explanation that Mr Liang had a poor memory based only on the affidavit of his niece who merely stated this was so. The applicant contends that given this evidence, the Board's findings were perverse and do not withstand a probing examination.

[22] The reasons of the Board indicate that it considered the implications of the "cheat sheets" and the explanation offered for their use. The Board accepted the affidavit evidence from Mr Liang's niece regarding his poor memory and nervousness. The Board also found that Mr Liang was not a sophisticated person. The Board found that the "cheat sheets" were used only as a memory aid and not for any improper purpose. One sheet of notes had been prepared by Mr Liang's Canadian lawyer and the other by his niece based on information on the internet. The Board accepted that such preparation was reasonable and that the contents were true. As noted by the respondent, the applicant did not cross-examine Mr Liang's niece on her affidavit regarding Mr Liang's poor memory. As this was the only evidence before the Board regarding Mr Liang's

nervousness and poor memory, the Board was entitled to consider the evidence and give it the appropriate weight.

The Board's findings

[23] In considering the Board's reasons as a whole, it is clear that the Board made several findings which supported its decision that the marriage was genuine, including the following:

- Mr Liang and Ms Xie are compatible according to age, language, ethnicity and place of origin, have common future plans, and have been in a marital relationship for over seven and a half years;
- Both Mr Liang and Ms Xie are financially independent;
- Mr Liang has job security and a stable relationship with his family members in China, which undermine any ulterior motives for his immigration to Canada;
- Both Mr Liang and Ms Xie have integrated in each other's family life by attending social events with each other's family members in China;
- There is corroborating evidence with respect to their first meeting, the proposal and marriage, the four post-marital visits, and that Ms Xie, her son, and Mr Liang lived together for a period of one year, during which time the son was enrolled in school, and other periods of up to three months in China since their marriage;
- Mr Liang has a relationship with Ms Xie's son and they regularly communicate with each other;

- Mr Liang has provided financial support to Ms Xie on occasion;
- Mr Liang has persisted in his attempt to immigrate to Canada to join his wife and other family in Canada despite two failed attempts; and,
- Mr Liang never sought to visit Canada prior to his marriage even though he has close family here.

[24] As noted above, the standard of review is reasonableness and the decision of the Board, an expert tribunal, is owed deference. The Board considered all the evidence, including the inconsistencies, and determined that, as a whole, the positive features of the marriage outweighed the minor inconsistencies and/or were explained to the satisfaction of the Board. It is not the role of the Court to re-weigh the evidence considered by the Board.

[25] As noted by Justice Strickland in *Canada (Minister of Citizenship and Immigration) v Chen*, 2013 FC 215:

[43] The jurisprudence of this Court confirms that there is no specific test or set of tests established for determining whether a marriage or relationship is genuine and that the relative weight to be given to each is exclusively up to the officer or panel (see *Keo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1456 at para 24; *Zheng v Canada (Minister of Citizenship and Immigration)*, 2011 FC 432 at para 23; *Ouk v Canada (Minister of Citizenship and Immigration)*, 2007 FC 891 at para 13; *Khan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1490 at para 20). In this case the Panel used its discretion and, despite the evidentiary inconsistencies that it noted, concluded that the marriage was genuine and was not entered into primarily for the purpose of acquiring any status or privilege under the IRPA.

[26] In conclusion, I would dismiss the application for judicial review. No question was proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

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

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND
IMMIGRATION v WEI HONG XIE

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**REASONS FOR JUDGMENT
AND JUDGMENT:** KANEJ.

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