Federal Court  Cour fédérale

Date: 20180315

Docket: IMM-3130-17

Citation: 2018 FC 304

Ottawa, Ontario, March 15, 2018

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

YUCONG MAI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] On June 28, 2017, Yucong Mai's application for permanent residency under the Spouse in Canada Class was refused by an Immigration Officer with Citizenship and Immigration Canada. The Officer found that Mr. Mai is excluded from the definition of a spouse because his marriage history satisfies the type of excluded relationship set out in section 4.1 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. Since Mr. Mai did not

qualify as a “spouse,” his application for permanent residency was refused, and he was told to leave Canada immediately.

[2] On July 14, 2017, Mr. Mai filed for judicial review of this decision saying the Officer breached his right to procedural fairness and was unreasonable. I have judicially reviewed this decision, and find that Mr. Mai’s right to procedural fairness was not breached, nor was the decision unreasonable. For the reasons that follow, I am dismissing this application.

II. Background

[3] The Applicant, Yucong Mai, is a citizen of China. Briefly, the facts are that after Mr. Mai divorced from his wife, she married a Canadian citizen who sponsored her to Canada under the family class. She then divorced from her second husband, Mr. Mai moved to Canada, and he remarried Ms. Li who is his first wife. She is now trying to sponsor Mr. Mai under the Spouse in Canada Class. Like most relationships, many things happened between those events.

[4] The facts in more detail are that on March 12, 1999, Mr. Mai and Qiao Xian Li entered their first of two marriages together. According to the Applicant, his mother was unhappy they gave birth to a girl instead of a boy, and this caused a lot of marriage strife. The Applicant then lost his job and he and his wife started fighting daily. On September 15, 2004, the couple divorced.

[5] Ms. Li’s affidavit explains she then entered a new relationship in November of 2004 with Chi Hin Michael Tsang (a resident of Smithers, BC), introduced to her by her mother (who lives

in Vancouver, BC). They married in China one year later, on November 18, 2005. Mr. Tsang then sponsored her application for Canadian permanent residency, and on July 24, 2006, Ms. Li and her daughter moved to BC after obtaining their visas. They initially lived with her mother in Vancouver.

[6] After a brief time living with her mother in Vancouver, Ms. Li says she moved in with Mr. Tsang in Smithers. She alleges that they lived in a free room in the restaurant where Mr. Tsang worked, but because it was small the daughter stayed in Vancouver. In October 2006, Ms. Li found a job in Vancouver and went back there to live with her mother. Ms. Li and Mr. Tsang say that due to disagreements over these living arrangements, they separated in May 2007 and divorced on May 29, 2008.

[7] Ms. Li says she visited China in the summers so her daughter could visit with her father. After her second divorce, she says she started to spend more time with her Mr. Mai. On April 26, 2010, she gave birth to their second child in BC.

[8] The Applicant says he wanted to help raise his children in Canada. On September 24, 2012, he says he entered Canada illegally from the USA and moved in with Ms. Li at her mother's house. They eventually moved to Ontario where they now still live.

[9] On November 24, 2013, Ms. Li and Mr. Mai remarried.

[10] Mr. Mai then began his application for permanent residency in January 2014, applying under the Spouse in Canada Class. On May 31, 2017, after Ms. Li had been found eligible to sponsor Mr. Mai, they received a letter from Citizenship and Immigration Canada (CIC) telling them to come to an interview on June 16, 2017, in regards to their spousal sponsorship application. The letter told them to bring many kinds of documents, such as passports and divorce certificates.

[11] The interviewing Officer was concerned they had divorced and later remarried in order to primarily acquire a status or privilege under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. This concern arose because once Ms. Li had status from her second husband, she divorced him, then remarried her first spouse. Such relationships are excluded from the meaning of "spouse" due to section 4.1 of the IRPR. After the interview, the Officer told the Applicant and his wife they would not be considered spouses due to section 4.1. Thus, the Applicant's application for permanent residency under the Spouse in Canada Class was refused. On June 28, 2017, this decision was confirmed in writing and sent to the Applicant.

[12] The Officer's written decision finds that Ms. Li's marriage with Mr. Tsang was suspicious: she planned the entire wedding herself, could not remember where they lived in BC, she barely cohabited with him (instead she and her daughter mainly lived with her mother in Vancouver), and they had no joint obligations or documentation of a life together). This led to the Officer's finding that they lacked a shared life.

[13] The Officer also questioned the dissolution and resumption of the Applicant's relationship with Ms. Li. The Officer found it was suspicious that, after their divorce, the Applicant would bring the daughter over to his parent's house for visitation purposes, even though his parents were so upset they had a daughter. The Officer also found that Mr. Mai and Ms. Li's breakup and resumption lacked a reasonable and thoughtful process, and during their separate interviews, they had provided conflicting answers to questions like where they lived during their marriage.

[14] On July 14, 2017, the Applicant filed for judicial review of this decision.

III. Issues

A. Did the Officer breach procedural fairness?

B. Was the decision reasonable?

   i. Did the Officer misapprehend relevant evidence?

   ii. Did the Officer engage in an unreasonable assessment of the Applicant's credibility?

IV. Standard of Review

[15] The standard of review applied to decisions made pursuant to section 4.1 of the IRPR is reasonableness (*Zhi v Canada (Citizenship and Immigration)*, 2013 FC 1126 at para 38), and the standard of review of procedural fairness issues is correctness (*Ellis-Don Ltd v Ontario (Labour Relations Board)*, 2001 SCR 221 at para 65; *Nizar v Canada (Citizenship and Immigration)*, 2009 FC 557 at para 13).

V. Analysis

A. *Relevant Provision*

[16] The relevant provision is section 4.1 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227:

> 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 foreign national has begun a new conjugal relationship with that person after a previous marriage, common-law partnership or conjugal partnership with that person was dissolved primarily so that the foreign national, another foreign national or the sponsor could acquire any status or privilege under the Act.

B. *Did the Officer breach procedural fairness?*

[17] The Applicant submits the letter dated May 31, 2017, from CIC, breached his right to procedural fairness. He argued this letter, which scheduled him and his wife for an interview regarding his permanent residence application, did not disclose the Officer's concern about their divorce and re-marriage. The Applicant also argues the letter created a legitimate expectation the interview would only be about the topics discussed in the letter. He also says the Officer had a positive duty to advise him about any deficiencies in his application arising from credibility, accuracy, or genuine nature of the information according to *Talpur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 25 at paragraph 21. Finally, the Applicant says that it was unfair for the Officer to fault him for having difficulty remembering details about his relationship when the relationship was raised for the first time at the interview.

[18] I cannot agree with the Applicant's arguments for two reasons. First, as this Court has previously held, an officer does not have an obligation to give notice of concerns that directly arise from provisions of the IRPA or IRPR (*Fouad v Canada (Minister of Citizenship and Immigration*), 2012 FC 460 at para 16). In this case, I do not find that there was procedural unfairness because the Officer's concern about the relationship arose directly out of section 4.1 of the IRPR; an applicant is therefore already aware that relationships started and dissolved for the reasons described in this section are not within the definition of spouse as it is used in the IRPR.

[19] Second, there was no procedural unfairness because the letter is abundantly clear that all of the marriages and divorces were up for discussion and determination. For example, both Mr. Mai and Ms. Li were called for the interview, and asked to bring documents regarding their marriages and divorces from each other. As Ms. Li is trying to sponsor her husband, the Officer needed to examine both of their marriages. The Officer also needed to examine the marriage and divorce from Ms. Li and her sponsor (second husband Mr. Tsang) in this sponsorship application. The Officer spelled out documents the parties should bring in regards to the second marriage. In other words, the letter asks for documentation relating to all the relationships and was just more specific about the documentation related to her second marriage.

[20] Once the interview began, unanticipated concerns arose when the Applicant and his wife gave conflicting statements and information which further called into question the primary purpose of their prior divorce and remarriage. By implication the officer found the original marriage and remarriage to the current spouse were genuine marriages.

[21] While an officer does not have a duty to give notice of unanticipated concerns that are unknown until the interview, there is a duty to provide an opportunity to respond to those unanticipated concerns after they arise (*Kimball v Canada (Minister of Citizenship and Immigration)*, 2013 FC 428 at paras 10-11; *Pritchin v Canada (Minister of Citizenship and Immigration)*, 2014 FC 425 at paras 7-11).

[22] At the judicial review hearing, the Applicant said that he was not arguing he had no opportunity to respond to the Officer's unanticipated concerns, and said there was no documentation that they would have brought in response. Instead, the Applicant argued it was unfair that the Officer had not told them before of the concerns of their divorce and remarriage so they could refresh their memories about their divorce and remarriage before the interview as it had been a long time since their divorce and could not be expected to remember everything without a refresher. From the documents requested the Applicant said he only thought the interview was about his wife's second marriage.

[23] In *Cai v Canada (Citizenship and Immigration)*, 2016 FC 1227 [*Cai*], the parties raised a similar argument before me but with regards to section 4(1) of the IRPR. Like the case at bar, Mr. Cai and his wife also gave inconsistent answers during their interview. I found that procedural fairness was satisfied because the onus of satisfying the Officer that the relationships were genuine is on the Applicant:

> [34] I disagree as the parties were already well aware the determinative issue to be determined in the interviews was the genuineness of their marriage. It is not a science but is fact driven and nuanced. Much of the jurisprudence cited by the Applicant involves cases where an immigration or visa officer questioned the veracity of documents submitted in support of an application and

> failed to apprise the applicant of those concerns. This is not the case in the present application. The concerns that the officer had were based on the ostensible lack of evidence (e.g. only one photo of the couple during their affair) or the timing of when the evidence was produced (e.g. much of the information relating to the financial interdependence was generated around the time that the application was submitted). I find that the officer properly informed Mr. Cai and Ms. Chu of his concerns and allowed them the opportunity to present their evidence as completely as possible. The onus to provide sufficient evidence to satisfy the decision maker of the genuineness of the marriage is on the Applicant.

[24] Just as in *Cai*, I find that the Applicant failed to satisfy this onus. Although the Applicant believes this was unfair, the point of interviewing the parties separately is to determine if the marriages and divorces were to primarily to allow the acquisition of a status or privilege under the IRPA as set out in section 4.1 of the IRPR.

[25] In other words, the content of the duty of procedural fairness did not include allowing the parties to refresh their memories about their first marriage and divorce from each other. It was open for the Officer not to allow them to refresh their memory of their life together as a family, or about their divorce and remarriage a short time later. Those basic memories are not something that you have to be given time to refresh, or discuss and coordinate answers about. Separating parties during interviews and looking for contradictory statements is just one part of the tool CIC uses to determine if section 4.1 of the IRPR is satisfied. Furthermore, as noted above at paragraph 18, the parties should have known from the letter that all the marriages and divorces were at issue. It was not necessary to give them an additional interview or allow them to refresh their memories about something basic like why they divorced and re-married in this case.

C. *Was the decision reasonable?*

(1) Did the Officer misapprehend relevant evidence?

[26] The Applicant's written material argued the Officer misapprehended Ms. Li's explanation about living with Mr. Tsang, and says that from this error the Officer wrongly drew a "strong negative credibility inference."

[27] The interview notes included within the Certified Tribunal Record (CTR) demonstrate that Ms. Li said she lived in Smithers for about 10 months, but also in Vancouver:

> Q: You do not know the number and name of the street you lived? How long you lived there?
>
> A: About 10 months, but not always there, I also go to Vancouver, stayed with my mother. I do not know the address. Because I did not know English and did not receive letter there.

[28] The passages cited by the Applicant (CTR, pages 20, 22-23) from the question and answer portion of the interview are attempts by the Officer to clarify Ms. Li's answer with further questioning and not a misapprehension of the evidence. I do not find there was a misapprehension of Ms. Li's explanation.

(2) Did the Officer engage in an unreasonable assessment of the Applicant's credibility?

(a) *Plausibility Finding*

[29] The Applicant argued the Officer unreasonably decided that Mr. Tsang's lack of involvement with the wedding plans (for his marriage to Ms. Li after she had divorced from Mr. Mai) was a negative factor. The Applicant characterized this as a plausibility finding, and cites to a plethora of judicial reviews of refused refugee claims to say that plausibility findings are dangerous (*Jung v Canada (Minister of Citizenship and Immigration)*, 2014 FC 275 at para 74; *Pulido v Canada (Minister of Citizenship and Immigration)*, 2007 FC 209 at para 37; *Gjelaj v Canada (Minister of Citizenship and Immigration)*, 2010 FC 37 at para 2; *Ortiz Torres v Canada (Minister of Citizenship and Immigration)*, 2011 FC 67 at paras 26-32).

[30] In *Cai*, I explained that assessing the genuineness of a marriage "is not a science but is fact driven and nuanced" (at para 34). The fact that Mr. Tsang was not involved in his wedding plans is but one of many facts driving this Officer's analysis. Other factors included: 1) the lack of cohabitation evidence; 2) Ms. Li could not remember her Smithers address with Mr. Tsang; 3) the reasons her marriage ended; 4) the quick dissolution of her marriage with Mr. Tsang after arriving in Canada; 5) lack of commitment to a shared life; 6) lack of shared household activity with family or community; and 7) lack of emotional or financial interdependence. The Officer merely weighed all the evidence to come to the decision, which is entirely reasonable for the Officer to do. By implication the original marriage and remarriage to the current spouse were genuine marriages.

(b) *Microscopic Analysis*

[31] The Applicant submits that his case is like *Tamber v Canada (Minister of Citizenship and Immigration)*, 2008 FC 951 [*Tamber*], where "Justice Barnes held that unduly focusing on the minutiae and marginalities without paying enough attention to the bona fides of the marital relationship provided cause to invalidate the officer's decision."

[32] The present case is unlike *Tamber.* In this case, the inconsistent answers given by Applicant and his wife are not microscopic, but rather are part of the *bona fides* of the marital relationship—they could not get their story straight about basic things like where they lived or who they fought with. Furthermore, in *Tamber*, Justice Barnes found a microscopic analysis led to a reviewable error because that officer ignored evidence of a genuine marriage (at para 18). The failure to review all the evidence did not occur in this case.

[33] The Officer's decision was reasonable and procedurally fair. The application is dismissed.

[34] No question was presented for certification and none will be certified.

[35] The parties agreed that the correct style of cause should name the Respondent as "*The Minister of Citizenship and Immigration*" and not "*The Minister of Immigration, Refugees and Citizenship*".

JUDGMENT in IMM-3130-17

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to remove "The Minister of Immigration, Refugees and Citizenship" and replaced by "The Minister of Citizenship and Immigration";

2. The application is dismissed;

3. No question will be certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3130-17
STYLE OF CAUSE:	YUCONG MAI v THE CITIZENSHIP AND IMMIGRATION
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