Date: 20060614

Docket: IMM-5040-05

Citation: 2006 FC 757

Ottawa, Ontario, June 14, 2006

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

WEI MIN LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

Background

[1] By decision dated July 28, 2005, a member of the Immigration Appeal Division of the Immigration and Refugee Board (the tribunal) dismissed the appeal of Wei Min Li (the appellant), a permanent resident in Canada, from a decision dated August 11, 2003 of a Visa Officer at the Canadian Embassy in Beijing, People's Republic of China, refusing his sponsored application for permanent residence to Canada of his wife Gui hua Zeng, (the applicant).

[2] The tribunal based its finding on, in its own words, the doctrine of "*res judicata/ abuse of process*." It referred to a previous decision of the IAD dated August 17, 2001 which had dismissed an appeal by Mr. Li from a decision of another Visa Officer in Beijing of a first-timed sponsored application for the grant of permanent resident status in Canada to Gui hua Zeng whom he married in China in April of 1999.

[3] In its 2001 decision, the IAD had concluded the marriage between Mr. Li and Ms. Zeng contravened subsection 4(3) of the former *Immigration Regulations, 1978* which provided "the family class does not include a spouse who entered into the marriage primarily for the purpose of gaining admission to Canada as a member of the family class and not with the intention of residing permanently with the other spouse".

[4] In support of its conclusion in 2001, the IAD stated:

> "Based on the evidence before it, the panel is of the opinion that this is not a genuine marriage and that the principal applicant [Ms. Zeng] entered into the marriage primarily for the purpose of gaining admission into Canada and without the intention of residing permanently with the appellant. The panel bases its decision on a significant inconsistency in the evidence and the blatant misrepresentations of the principal applicant [Ms. Zeng] at her interview and in the information she provided in her application form. The panel does not accept the appellant's explanations as for why the principal applicant provided false information, and it is of the opinion that this misrepresentation undermines the credibility of the principal applicant and the claim that this is a genuine marriage." [Emphasis mine]

[5] The appellant did not seek judicial review of the IAD's 2001 decision. Rather, Ms. Zeng made a second sponsored application for permanent residence in Canada on April 1, 2002.

[6] The procedural history to the tribunal's decision is somewhat unusual and I summarize it:

1. On November 5, 2004, the tribunal commenced a hearing on Mr. Li's appeal. Mr. Li was not represented by counsel at that hearing. The hearing was adjourned to provide the Minister an opportunity to add an additional ground for refusal after it was realized the stated ground expressed by the Visa Officer in his August 2003 decision was the exclusionary provision of paragraph 117(9)(c)(ii)(b) of the *New Immigration and Refugee Protection Regulations* (the Regulations), finding Ms. Zeng, the common-law partner of another person and after the tribunal realized there had been a first sponsorship application in 1999/2000 which had been refused and unsuccessfully appealed to the IAD. Prior to adjourning the tribunal received in evidence documentation submitted by Mr. Li. That document of 93 pages was marked as exhibit A-1.

2. On December 10, 2004, the Minister moved to add an additional ground for refusing the sponsored application for permanent residence. The Minister submitted that *res judicata* in the form of issue estoppel applied relying on IAD Member, Stein's reasoning in *Vuong, Phuoc* v. *Minister of Citizenship and Immigration* (IAD) TA2-16835 of December 22, 2003. The Minister also argued a second appeal from the refusal of the application for permanent residence constituted an abuse of process. In sum, the Minister's counsel stated "the IAD should dismiss the appeal as it is an abuse of process and the issues which would be tried were finally decided between the parties and are *res judicata*.

3. Mr. Li retained present counsel in January, 2005. On January 27, 2005, Mr. Rotenberg wrote to the IAD indicating he would like a full-day hearing for a variety of reasons not the least of which is the evidence of the sponsor and that applicant and

possibly others. He stated his experience in this kind of case is that the examination and cross-examination often take up a good portion of the morning, even more so if the Minister intended to renew her *res judicata* argument.

4. In advance of a hearing scheduled for May 9, 2005 counsel for the appellant submitted on April 19, 2005 Mr. Li's supplementary disclosure package consisting of some fifty-five pages of documents including photographs of he and Ms. Zeng, photocopies of stamped passport pages, airline tickets, boarding passes and bus tickets, photocopies of phone bills and phone cards as well as a photocopy of Ms. Zeng's letter to the Visa Officer who had refused her second application. In that letter, counsel for Mr. Li indicated that he had been provided with a ninety-three page booklet of disclosure which had previously been filed as exhibit A-1.

5. Mr. Li, in his affidavit in support of his judicial review proceeding, stated "my hearing was supposed to happen on May 9, 2005 but did not proceed because another hearing which had started that morning in the same courtroom continued into the afternoon.

6. On May 26, 2005, counsel for Mr. Li filed the appellant's written submissions that neither *res judicata* nor abuse of process was appropriate in the matter. At page 18 of the Certified Tribunal Record (CTR), counsel for Mr. Li indicates what the nature of the evidence will be and I quote from paragraph 19:

> 1. That the relationship is real and genuine as subsisted during these years and continues to subsist and with two visits subsequent to the original decision, and is supported by a plethora of actual phone calls although made by telephone cards and those are recorded in the bills of Sprint and are set out in the disclosure.
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> 2. The genuineness of the relationship is not only supported by the communication itself and by the money transfer but by the relationship

> between the son of the applicant, that son and the son of the sponsor and additionally as well as more importantly, the sponsor whom that applicant's son looks upon in a fatherly manner. Therefore, I would add to the package of submissions to go with natural justice concept that of the interest of the child.

[7] In those submissions, counsel for Mr. Li stated additional facts and specifically identified bad advice received from an Immigration Consultant. He submitted that the lawyer Mr. Li retained for the 2001 IAD appeal had been negligent in the manner in which he presented the appellant's evidence.

[8] Counsel for Mr. Li's written submissions concluded by stating "my submission is therefore that *res judicata* does not apply; that subsequent evidence, including the calling of the applicant and her son, is appropriate and proper in this case and is not "abuse of process" nor is the Minister "unjustly hounded."

[9] Section 4 of the *Regulations* now in force is labelled "bad faith" and provides the following:

Bad faith 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. SOR/2004-167, s. 3(E).	**Mauvaise foi** 4. Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait, le partenaire conjugal ou l'enfant adoptif d'une personne si le mariage, la relation des conjoints de fait ou des partenaires conjugaux ou l'adoption n'est pas authentique et vise principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi. DORS/2004-167, art. 3(A).

The Tribunal's Decision

[10] First, the tribunal quoted lengthy excerpts from the IAD's previous decision of August 17, 2001 ending with the conclusion referred to at paragraph 4 of these Reasons.

[11] Second, the tribunal summarizes counsel for Mr. Li's arguments as to whether *res judicata* applied, namely, whether the three required conditions were met, that is, the same question is at issue in the two cases; the judicial decision that was said to create the estoppel was final; and the parties to the judicial decision were the same persons as the parties to the proceeding in which the estoppel is raised.

[12] Third, the tribunal canvassed the divergent decisions at the IAD as to whether the same question was involved in an IAD decision which was decided under subsection 4(3) of the former *Immigration Regulations* and one before another IAD tribunal making a determination under the provision of section 4 of the new *Regulations*.

[13] Fourth, the tribunal preferred the reasoning of Member Stein in *Vuong, supra*, to the effect that while the provision of the old *Regulations* were not the same as the provisions of the new *Regulations*, those provisions did indeed decide the same question because their intent and the nature of the inquiry are substantially the same. Member Stein wrote in *Vuong, supra*, that both provisions aim to exclude spouses whose status as a spouse is not based on the creation of a *bona fide* marital relationship, their aim being to exclude spouses whose marriage was entered into primarily to achieve an immigration purpose.

[14] Fifth, the tribunal stated the following with respect to the appellant's fresh evidence:

> Now, the fresh evidence that the appellant proffers amount to no more than the threadbare "the Devil-made-me-do-it" defence, blaming these sundry falsehoods on an unqualified immigration consultant and the conclusions of Member Whist on the alleged incompetence of the appellant's lawyer. Such evidence is hardly likely to be decisive.

[15] Seventh, the tribunal likely expressed its conclusions in the following manner:

> As counsel for the respondent points out, rather than see judicial review before the Federal Court of that first IAD decision, the parties chose instead to make a second application for a permanent resident visa. It is clear that having been refused a second time, what the appellant now seeks to relitigate the entire issue, hoping that a new panel of the IAD will come to a different factual determination and find that the marriage in indeed based on true love.
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> It would be difficult to conceive of a clearer case of abuse of process. Should that practice be acceptable, this merry-go-round would be open to virtually every appellant whose marriage was found not to be genuine, or "appeal by attrition"as it was characterized in the IAD decision in *Khan* which preceded the IAD decision in *Kaloti*.
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> Finally, counsel for the appellant argues that *res judicata* is not applicable to public statutes and notes that *Kaloti* preferred to rely on the doctrine of abuse of process.
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> Again, this argument takes the appellant down a blind alley. Whether or not the Federal Court of Appeal in *Kaloti* intended to distance itself from its earlier decision in *O'Brien* which affirmed that *res judicata* operates in the sphere of public law, the appellant is still caught by abuse of process doctrine that *Kaloti* advanced in dismissing the appeal. The panel is not persuaded that Décary J.A., who authored the court's reasons in both *O'Brien* and *Kaloti* was signaling any such intention by the court.
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> There is a legitimate public policy interest in not having the same matter reliltigated over and over by the same parties. To permit this appeal to go forward, on the basis of the legal elements and the so-called "new" evidence offered here, would be for the IAD to place its imprimatur on a process that, to quote the Federal Court of Appeal in *Kaloti* would allow the respondent to "be unjustly hounded given the earlier history of the matter."
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> Due to the panel's finding on *res judicata/abuse of process*, it is unnecessary for the panel to consider the other ground of refusal [R117[9]c(ii)B].

Analysis

[16] Counsel for Mr. Li, in his memorandum had raised three issues:

1. The doctrine of res judicata did not apply to public law statutes;

2. If the doctrine of res judicata did apply, were the requirements of issue estoppel, a form of *res judicata*, met. Counsel conceded the determination of this issue turned on the point whether the same question had been decided in the 2001 IAD decision which, as noted, was based on subsection 4(3) of the former *Regulations* whereas the second appeal was to be heard under section 4 of the new *Regulations*. He argued the question under the two provisions were different and that the tribunal erred in so finding; and

3. The tribunal erred in not considering the new documentation submitted by the appellant without hearing it before making a finding of *res judicata* or abuse of process. Counsel submitted the tribunal made its decision without any evidentiary basis indicating that the sponsors'stepson was going to testify that the clothing found in the closet during the site-visit was his and why he had a picture of his father on the wall, in rebuttal to the inference taken by the visa officer in the second application that his wife still cohabitated with her ex-husband.

[17] At the hearing counsel for Mr. Li abandoned his first point that *res judicata* did not apply to public law statutes.

[18] With respect to the second point, to which I apply the standard of correctness as it involves a legal question, counsel for the applicant appreciated his written argument was filed before Justice Shore issued his decision in *Mohammed* v. *Canada (Minister of Citizenship and Immigration)* 2005 F.C. 1442.

[19] In *Mohammed, supra,* Justice Shore was reviewing a decision by the IAD which had dismissed a second appeal on a second sponsorship application on the grounds of *res judicata*. Justice Shore discussed that principle in the context whether the same question was decided by the IAD under the former *Regulations* as it would be under section 4 of the new *Regulations*. He concluded that the question under both provision was essentially the same and he quoted with approval IAD Member Stein's decision in *Vuong, supra.*

[20] I agree with Justice Shore's reasons in *Mohammed, supra,* and would reject counsel for the applicant's argument.

[21] As to his last point which also commands a correctness standard involving a legal question, Mr. Rotenberg argued the tribunal committed an error by not hearing the appellant's proposed evidence in order to determine whether it constituted relevant and admissible new evidence fitting within the exception to the rule that a party cannot relitigate an issue which was finally decided between the same parties. He relies on Justice Nadon's decision as a member of the Federal Court Trial Division in *Kular* v *Canada(Minister of Citizenship and Immigration)*[2000] F.C.J. No. 1393.

[22] Counsel for the appellant's point is well-taken as appears from the following paragraphs of Justice Nadon's decision:

> ¶ 5 I wish to point out that in Kaloti, before the Court of Appeal, counsel for the applicant conceded that his client's second sponsor application was not based on any new evidence. That is why, in my view, the Court of Appeal concluded that it was open to the IAD to dismiss the application so as to prevent an abuse of its process. The Court of Appeal did not, as a result, address the issue of res judicata.

> ¶ 6 In Kaloti, the Court of Appeal did not decide whether an applicant could bring a second application based on new evidence, i.e., evidence that was relevant and admissible. In other words, can an applicant bring a second application so as to demonstrate the intent of the sponsored spouse at the time of the marriage, as is required under subsection 4(3) of the Regulations? In my view, such an application can be brought.
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> ¶ 7 Whether the second application will constitute an abuse of process or whether it should be dismissed by reason of res judicata are questions which the IAD will have to decide. However, it seems to me that the IAD must allow the applicant to present her evidence before deciding these issues. If in the IAD's opinion the evidence adduced does not constitute new evidence, then it will certainly be open to it to dismiss the application on the ground that it is abusive of its process. If the evidence adduced is in fact new evidence, then the Board can decide whether the issues raised are res judicata.
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> ¶ 8 I am therefore of the view that the Board made a reviewable error when it dismissed the applicant's appeal before allowing the applicant to present her evidence. Consequently, the decision of the IAD rendered on September 20, 1999 will be set aside and the matter will be returned for rehearing and redetermination by a different panel.

[23] Counsel for the respondent argued the tribunal complied with *Kular, supra,*. I agree with her.

[24] The tribunal had before it the appellant’s disclosure consisting of 95 pages of documents purporting to show the genuineness of the marriage which had been received in evidence. In addition, counsel for Mr. Li made a supplementary disclosure in April 2005 which had been previously described.

[25] Specifically, as noted, that supplementary disclosure, CTR page 146, contains a letter dated May 25, 2005, from Ms. Zeng to the Visa Officer explaining the picture of her ex-husband on the wall of her home and the presence of male clothing.

[26] Moreover, in his written submission on *res judicata*, counsel for the appellant discussed this evidence including the allegations of negligence by his former lawyer appearing before the IAD and the fraudulent advice received from the Immigration Consultant.

[27] Justice McKeown in *Sekhon* v. *Canada (the Minister of Citizenship and Immigration)* 2001 FCT No1354 dealt with the procedure to be followed by the IAD to allow a person to present evidence before deciding whether it constitutes new evidence or whether the appeal is an abuse of process. He agreed with the IAD's ruling that *Kular* did not mean the IAD must grant the respondent an oral hearing but that he must be given an opportunity to present evidence. Justice McKeown expressed himself as follows at paragraphs 11 and 12 of his decision as follows:

> ¶ 11 I agree with the Appeal Division that they were under no obligation to grant a full oral hearing but I have some concern as to whether they provided a full opportunity to counsel for the applicant to be heard. In my view, the Appeal Division should have provided counsel with a copy of the Kular decision and asked them for their submissions with respect to the application of Kular to this case. The applicant's counsel also erred in not providing the Appeal Division with a summary of the proposed new evidence. The only evidence that was referred to by the Board, and of which they had knowledge, was in the sentence:
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> Even the visit of Mr. Sekhobn to India occurred after the second application was filed.
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> ¶ 12 In my view, in light of the Appeal Division's failure to allow comment by counsel on the Kular case, I am returning this matter to the Appeal Division. However, the applicant must submit any new evidence by way of affidavit. There is no requirement to have an oral hearing. Furthermore, the Minister shall be entitled to file responding affidavits if so desired. The Appeal Division will have to decide whether this second application constitutes an abuse of process or whether it should be dismissed by reason of res judicata. If the Appeal Division decides the evidence adduced does not constitute new evidence then it will be certainly open to it to dismiss the application on the ground that it is an abuse of process. If the evidence adduced is in fact new evidence then the Appeal Division can decide whether the issues raised are res judicata.

[28] The record shows the tribunal, in this case, complied with the requirements of *Sekhon* in that submissions were made, the proposed new evidence filed and commented upon.

ORDER

THIS COURT ORDERS that this application for judicial review is dismissed. Counsel for the appellant proposed certified questions which I decline to formulate. This case does not give rise to questions of public importance. The decision turns on its unique facts.

"Francois Lemieux"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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