Date: 20091015

Docket: IMM-2002-09

Citation: 2009 FC 1042

Ottawa, Ontario, October 15, 2009

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

FUSHENG MA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Fusheng Ma challenging a decision by a Visa Officer (Officer) to refuse his application (and those of his wife and accompanying child) for permanent residency.

I. Background

[2] In 2004, Mr. Ma and his wife, Chun-e Wu, applied to emigrate to Canada under the business skills category of the British Columbia Provincial Nominee Program, and on July 30th of that year

their application was approved. That approval was subject to the issuance of temporary work visas through the Canadian Embassy in Beijing, along with a visitor's visa for their accompanying dependent child, Jun Ma. Those visas were issued on May 19, 2005 and have since been renewed.

[3] When the family arrived in Vancouver in May 2005, they enrolled Jun in a public elementary school. In April 2006, Mr. Ma and Ms. Wu were authorized to apply for permanent resident visas and shortly thereafter they did so. In July 2006, the Canadian Consulate in Seattle requested that the family proceed with the required medical examinations. In the course of completing those assessments, it was determined that Jun had a moderate intellectual disability that would necessitate special education. On February 15, 2007, the Department's Medical Services Branch requested information about the anticipated cost of additional educational and life skills support for Jun for the following five years. The record indicates that Mr. Ma had difficulty obtaining the required information from the Vancouver School Board prompting the Officer to write to Mr. Ma on December 6, 2007, imposing a response deadline of two months. The requested information was obtained shortly thereafter and it led the Officer to believe that Jun's health condition might be expected to cause excessive demand on health or social services in Canada. Such a finding would render the family inadmissible to Canada by virtue of ss. 38 and 42 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). Under letter of May 2, 2008, the Officer apprised Mr. Ma of his concern and requested additional information including the completion of Declarations of Ability and Intent. The Declarations were in a form provided by the Officer and included the following statement:

> I hereby declare that I have fully informed myself of the availability and cost of some alternative methods of service delivery to offset the

> excessive demand on social services. I am providing with this declaration the details of the alternative methods I intend to use in Canada.
>
> I hereby declare that I will assume responsibility for arranging the provision of these services, delivered by a private service provider, community group, family member, or other service provider (organization/individual), and will defray the costs for these services. I am providing with this declaration evidence showing these individuals/organizations are willing and able to deliver the required services privately. I am also providing with this declaration evidence showing I have or will have the ability to defray the related costs.
>
> I hereby declare that I will not hold the federal or a provincial/territorial authority responsible for any cost associated with this alternative provision of services.
>
> I am signing this declaration of my own volition, not due to force or the influence of any other person, and I make this declaration conscientiously believing it to be true.

[4] On June 11, 2008, Mr. Ma wrote to the Officer enclosing Declarations of Ability and Intent executed by himself, his wife and his brother. He also advised that arrangements were underway to enroll Jun in a private school at a tuition cost of $28,800 per year. Mr. Ma concluded by stating that he hoped the submissions were in order, but if questions remained the Officer should so advise.

[5] The Officer did follow up some six months later with a letter indicating a continuing concern about the *bona fides* of the family's commitment to meeting Jun's future private school expenses. That matter was expressed as follows:

> You also state that you intend to enroll June in Glen Eden Multimodal Centre, a private school whose tuition fees are $28,800 per year. The letter from Glen Eden states that Jun will be enrolled at the school "upon his entry to Canada." Jun entered Canada in May 2005. Your submission contains no explanation regarding the

> reason why Jun has, to this point, been enrolled in a public rather than a private educational institution, or evidence to show when you initiated your search for a private institution.
>
> I note that you have stated that the cost of the special education and other services Jun will require will be borne privately by you and, if necessary, by your brother. Whilst I do not have any particular doubts regarding your family's ability to pay these costs privately, in my judgment the fact that Jun has only been enrolled in a public school in Canada to this date significantly undermines the assertion that, in future, his educational and social services expenses will be paid for privately.

The Officer allowed a further 60 days for Mr. Ma to address this concern.

[6] On January 19, 2009, Mr. Ma wrote to the Officer and provided evidence that Jun was enrolled in a private school and that the initial tuition fee of $15,000 had been paid. Mr. Ma again invited the Officer to contact him if any questions remained or if more evidence was needed. Notwithstanding Mr. Ma's invitation, the Officer proceeded to render a final decision on February 25, 2009. He rejected the family's application for the following reasons:

> You have stated that Jun Ma will attend a private school, Glen Eden Multimodal Centre, at a five-year cost in today's dollars of $144,000. Your 2007 T-4 showed an income of $40,183. To assist you, however, your brother, Yuan Chun MA who is President and CEO of Canadian Phytopharmaceuticals Corporation, has declared his willingness to defray the cost of your son's special education. Consequently, you appear to have the financial ability to offset the cost of Jun's special education privately. I am aware also that Jun is currently attending Glen Eden School.
>
> However, I am not satisfied that you will continue to bear these costs. In particular, I note that Jun has been enrolled in a public school, Gladstone Secondary, since shortly after his arrival in Canada in May 2005. Furthermore, you have provided no evidence or information to indicate that you have ever borne the financial costs of

> social services received by your son. Only as recently as January 2009 was your son enrolled in Glen Eden School, a fact which raises the question of whether this was done primarily for the purpose of securing immigrant visas for yourself and your dependents rather than as part of a genuine plan to assume responsibility for the cost of your son's special education services which are otherwise publicly available.
>
> Since I am not satisfied that you have both the ability and intent to offset the excessive demand on social services that will be required for your son, Jun Ma, the medical assessment notified to you in my letter of 02 May 2008 is final.

II. Issue

[7] In the circumstances of this case did the Officer breach the duty of fairness?

III. Analysis

[8] The determinative issue in this application is one of procedural fairness which must be assessed on the basis of correctness: see *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539.

[9] There is no question on this record that the Officer appropriately informed Mr. Ma about his initial concerns that the family had not established that they had the means and the intention to meet Jun's future private school expenses. Mr. Ma was later able to satisfy the first of these concerns by providing a Declaration from his brother which confirmed the brother's financial capacity. Nevertheless, that Declaration and those put forward by Mr. Ma and his wife were implicitly rejected by the Officer with respect to the issue of their future intentions. That aspect of the decision was based solely on the Officer's stated belief that the family's past conduct in accessing public

educational services for Jun carried more probative value than their sworn Declarations confirming their intention to meet private school costs into the future. The Officer found that Jun's placement in a private school only occurred after the issue of Jun's medical inadmissibility was raised and, as he put it in the decision letter, this was done for the purpose of securing immigrant visas.

[10] I agree with counsel for the Applicant that the Officer does seem to have been unduly concerned about the fact that Jun had been initially enrolled in public school. The family was under no legal obligation to proceed differently until the issue of inadmissibility was raised, and it was only then that their actions could be fairly scrutinized. The Officer's pejorative characterization of the motive for enrolling Jun in private school is troubling because, as I said in *Lee v. Canada (Minister of Citizenship and Immigration)* (2007), 2007 FC 814, 63 Imm. L.R. (3d) 222 at paragraph 14, "[t]here is nothing inherently objectionable about taking … a step with a view to improving an application for landing provided that the process is carried out openly…".

[11] What is of greater concern, however, is the Officer's failure to inform Mr. Ma that, notwithstanding the family's sworn Declarations of Intent and the actual placement of Jun in a private school, the Officer was still not satisfied that their future intentions were honourable.

[12] It is clear that the Officer did not accept these Declarations at face value and, without saying so directly, he found them to be untrue and sworn only for the purpose of obtaining visas. This was an inference that was based on a negative credibility determination which itself rested upon a

tenuous factual underpinning. It was also made without an interview and in the absence of an explicit warning that the credibility of Mr. Ma, his wife and his brother was in issue.

[13] While I accept the Respondent's argument that there is always a point when a visa officer is entitled to call an end to a dialogue like this one, here that endpoint had not been reached. This was a point of such significance that it was a breach of the duty of fairness for the Officer to fail to explicitly put it to Mr. Ma and to give him a meaningful opportunity to address it either through an interview or by other acceptable means. This was a problem that should have been amenable to a fairly simple practical solution and this refusal was, accordingly, premature. On this point of fairness, I accept the analysis of my colleague Justice Richard Mosley in *Hassani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, [2007] 3 F.C.R. 501 which includes the following summary of the authorities:

> [24] Having reviewed the factual context of the cases cited above, it is clear that where a concern arises directly from the requirements of the legislation or related regulations, a visa officer will not be under a duty to provide an opportunity for the applicant to address his or her concerns. Where however the issue is not one that arises in this context, such a duty may arise. This is often the case where the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application is the basis of the visa officer's concern, as was the case in *Rukmangathan*, and in *John* [*John v. Canada (Minister of Citizenship and Immigration)* (2003), 2003 FCT 257, 26 Imm. L.R. (3d) 221 (F.C.T.D.)] and *Cornea* [*Cornea v. Canada (Minister of Citizenship and Immigration)* (2003), 2003 FC 972, 30 Imm. L.R. (3d) 38] cited by the Court in *Rukmangathan*, above.

[14] I would add that it is well within the Respondent's capacity to devise a regulatory solution for the problem presented by this case. The Department has created a form of declaration for visa

applicants and, in doing so, it leaves an impression that this will suffice. The fact that these declarations apparently cannot be enforced, and that there are presently no other methods to legally bind someone in the situation of Mr. Ma, is an issue for the Department to solve. Until it does, it needs to show more patience and greater guidance to applicants than was afforded to Mr. Ma.

[15] The Respondent has not proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application is allowed with the matter to be remitted to a different decision-maker for redetermination on the merits, including the assessment of any additional relevant evidence that the Applicant tenders.

" R. L. Barnes "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2002-09
STYLE OF CAUSE:	FUSHENG MA v. MPSEP
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	September 30, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	BARNES J.
DATED:	October 15, 2009

WRITTEN REPRESENTATIONS BY:

Lu Chan 604-430-1016	FOR THE APPLICANT
Helen Park 604-666-2061	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lu Chan Barrister and Solicitor Burnaby, BC	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT