Federal Court  Cour fédérale

Date: 20110218

Docket: IMM-2983-10

Citation: 2011 FC 196

Ottawa, Ontario, February 18, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

SHI LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act* (*IRPA*) for judicial review of a May 13, 2010 decision of the Immigration Division of the Immigration and Refugee Board of Canada (IRB), which deemed the applicant to be inadmissible to Canada pursuant to an exclusion order based on the *IRPA* s. 40(1)(a). For the reasons that follow, the application for judicial review is dismissed.

[2] The applicant legally entered Canada from China in August 2005 on a student visa. The visa was valid until September 2010. The applicant met Hao Lou at Seneca College when the company Mr. Lou worked for did a promotion on the campus where she was a student. The applicant claims that they dated and were married on March 16, 2008. Ms. Li subsequently filed an application for permanent residency and Mr. Lou filed a sponsorship application in her favour.

[3] In January 2010, Canada Borders Services Agency (CBSA) officers visited the applicant's residence to conduct an investigation of her status in Canada. Based on their observations made at the time and statements made by Ms. Li, the CBSA officers concluded that she was not cohabitating with her spouse and further, having failed to inform CBSA of this fact, that she was in violation of s. 40(1)(a) of the *IRPA*. She was subsequently arrested, cautioned and her passport was seized. The matter was then sent to an admissibility hearing. On May 13, 2010 the hearings officer concluded, based on the admission of Ms. Li through her counsel, as she and Mr. Lou were no longer cohabitating, that Ms. Li was in violation of s. 40(1)(a) of the *IRPA* and an exclusion order was issued.

[4] Counsel for Ms. Li now contends that the CBSA officers failed to inform the applicant of her right to counsel at the time of her arrest and thus asks this Court to set aside the IRB decision and grant a new admissibility hearing. Specifically the applicant seeks to set aside the decision on the basis that there was a breach of procedural fairness in respect of the questioning at the investigation stage, that the applicant's protections under section 10(b) of the *Charter of Rights and Freedoms* (the *Charter*) were not respected and the applicant was denied the right to a full and fair

hearing before the Immigration Division.

[5] The substance of the applicant's concerns relate to the conduct of the investigation itself. Counsel for Ms. Li argues that the officers were conducting a random audit as part of a broader investigation of marriage of convenience cases and that there was no evidence on the record as to what prompted the officers to attend at her home and have her answer questions. Counsel contends that there must be some evidence on the record of the basis of the officers' suspicions in order to give rise to a right to question the applicant. There are two problems with this argument.

[6] First, non-citizens do not have an unqualified right to remain in Canada. When the basis of the applicant's in-Canada sponsorship application evaporated, she had an obligation to inform Citizenship and Immigration officials of a material change in her circumstances. This she did not do. Secondly, the *IRPA*, ss. 15 and 16, authorize CBSA officers to verify whether the criteria in the *IRPA* governing entitlement to permanent resident status in Canada are met. There is no support in the jurisprudence for the proposition that the officers must disclose, on the record, the rationale underlying their decision to audit the veracity of the applicant's claim.

[7] The denial of the right to counsel is said to have manifested itself in two respects. First, the applicant contends that as she faced the threat of arrest and immediate exclusion from Canada, the right to counsel was engaged immediately upon the arrival of CBSA officers at her residence. Secondly, the applicant argues that the statement in the officers' notes: "Subject is advised of her rights…" is insufficient evidence to support the conclusion that she was advised of her right to

counsel. Counsel contends that, at a minimum, there should be evidence that she was "cautioned" as is the usual shortform for a warning under s. 10(b) of the *Charter*.

[8] The later argument can be quickly disposed of. This argument is not supported on the plain and ordinary reading of the notes. The language "subject is advised of her rights" is, in the ordinary and literal meaning of the words, synonymous with being "cautioned". The clear meaning of these words is put beyond doubt when read in their context, that is, occurring as they do immediately after the notation that the applicant was advised that she was being arrested for a "misrepresentation / admissibility hearing". The import of the words is reinforced by the fact that subsequent to "being advised of her rights" the officers' note that the applicant "…claims not to understand the investigator report questions and acts sleepy." In any event, no admissions against interest are included in the report subsequent to the applicant being cautioned.

[9] The crux of the applicant's case is that her s. 10(b) *Charter* rights ought to have been engaged at the outset of the CBSA investigation. This would, of course, require counsel to be present at the outset of the investigation phase and immediately prior to arrest. The principle expressed by the Supreme Court of Canada in *Dehghani v Canada (Minister of Employment and Immigration)*, [1993] 1 SCR 1053 provides guidance. While *Dehghani* was concerned with a person who was interrogated at a secondary examination at the airport, the principle articulated by the Supreme Court is appropriate:

> …neither the existence of a statutory duty to answer the questions posed by the immigration officer nor the existence of criminal penalties for both the failure to answer questions and knowingly making a false or misleading statement necessitates the conclusion that the appellant was detained with in the meaning of s.10(b). (para. 41)

[10] There is no doubt that Ms. Li was about to be detained when the officers advised her of their intention to arrest her for violation of the *IRPA*. However, prior to that intention having been formed, the enforcement officers were not required to inform Ms. Li of a right to counsel when they were questioning her. The right arose only upon their decision to arrest her: *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, para. 53-61; *R v Grant*, 2009 SCC 32.

[11] When viewed through the lens of procedural fairness, regard also has to be had to the fact that subsequent to arrest, the applicant has the right to counsel, the right to disclosure and the right to call witnesses before the Immigration Division. In this context, and having regard to the fact that the requirements of procedural fairness are less exigent in the context of proceedings under s. 44 of the *IRPA*: *Richter v Canada (MCI)* 2008 FC 806, para. 18, procedural fairness does not trigger a right to counsel at the investigation stage.

[12] The applicant advances a further argument that relates to the right of the applicant to be fully represented by counsel. While not argued in the memorandum of fact and law, the applicant contended in oral argument that the concession before the Immigration Division of her breach of s. 44(1)(a) of the *IRPA* was ill-advised. Counsel before this Court, who was not counsel at the admissibility hearing, contended that it should not have been conceded that the applicant had violated the conditions of her right to remain in Canada, as there is ambiguity around the meaning of the requirement that the applicant "cohabit" with her Canadian partner. Counsel also argues that since the date when the applicant and her husband ceased to live together was not known with precision, there was an insufficient evidentiary basis to support the concession.

[13] Ms. Li was represented by counsel at both the case management meeting on April 9, 2010, where the issues were discussed, and at the admissibility hearing of May 13, 2010. There can be no doubt that she fully understood what was in issue at these hearings. An interpreter was also present at her admissibility hearing:

> **MEMBER:** Yeah, I see her struggling. So perhaps we should use the interpreter just to make sure.
>
> **COUNSEL:** Yes.
>
> **MEMBER:** We will have an interpreter then.
>
> **INTERPRETER:** You have to speak up if you do not …
>
> **COUNSEL:** You have to speak.
>
> **PERSON CONCERNED:** I thought I do (inaudible).
>
> **MEMBER:** You – how well do you understand English?
>
> **PERSON CONCERNED:** May be 80%.
>
> **MEMBER:** 80%.
>
> But for legal hearing 80% is not good enough, so we will proceed with the interpreter.
>
> 80% may be fine for conversational English, but for legal proceeding, we need to ensure that you understand the 100%.
>
> **COUNSEL:** Okay.
>
> **MEMBER:** So we will go with the interpreter.
>
> **PERSON CONCERNED:** Okay.
>
> **COUNSEL:** Okay.
>
> **MEMBER:** Okay.
>
> So we will proceed with the interpreter from here on you, okay.
>
> **INTERPRETER:** Yes.

[14] The concession of the violation of s. 44(1)(a) of *IRPA* was clear and unequivocal:

> **MEMBER:** Are the parties prepared to proceed today?
>
> **MINISTER'S COUNSEL:** Yes.

> **COUNSEL:** Yes.
>
> **MEMBER:** All right.
>
> Normally we begin with Mr. Greco to present the government's case, but as I understand that there will be some concessions.
>
> **COUNSEL:** Yes.
>
> **MEMBER:** So begin with the concessions.
>
> **COUNSEL:** Yes.
>
> Mr. Member, the chairman, as I indicated earlier I am legal counsel […] and I represent the subject of this hearing Ms. Shi Li.
>
> We are prepared to concede that Ms. Shi Li was not cohabiting with her sponsor at the time when the investigator attended at her apartment.
>
> And that she did not directly advise the immigration authorities of this what we considered to be a material fact.
>
> We want to put on record though that Ms. Shi Li did enter into a valid and subsisting marriage, which has broken down.
>
> And so you know what as I understand the law particularly the Immigration Act this would not prevent the finding under section 40(1)(a) of that Act.
>
> And we are not prepared to contest that. We are conceding that fact that she was not residing with her spouse at the time of the investigation.

[15] Clients are understood to have authorized, and are bound by, their counsel's representations. This is the basic rule governing the relationship between counsel and their clients. The Court will not second-guess whether the case could have been argued differently or if concessions were strategically inadvisable. In closing I would note that Ms. Li does not attest in her affidavit to a lack of confidence in her counsel, to a lack of understanding of what transpired at the hearing or to an absence of mandate or authority for the position taken by her counsel.

[16] The facts of this case are far removed from those of *Shirwa v Canada (Minister of Employment and Immigration),* [1994] 2 FC 51, as relied on by counsel for the applicant. In that

case, the applicant was represented by an individual who held himself out to be counsel when he was not, failed to file written submissions when requested, and simply entered a Personal Identification Form (PIF) as his representation on behalf of his client. This is simply not the case here.

[17] Accordingly, the application for judicial review is dismissed.

[18] The applicant has proposed a question for certification:

> What should the standard of review/procedural fairness be in writing a section 44 report regarding the allegation of a marriage of convenience?

[19] In my view, this question does not meet the strict criteria governing certification of questions as determined by the Court of Appeal: *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145. What is proposed is a generic question, which, on the facts of this case, is hypothetical. The question posed does not need to be determined to resolve this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. The proposed question is not certified.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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