

Federal Court



Cour fédérale

**Date: 20130529**

**Docket: IMM-3432-12**

**Citation: 2013 FC 563**

**Ottawa, Ontario, May 29, 2013**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**MONG AH SHADOW LAI**

**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*, SC 2001, c 27 (the Act) for judicial review of a decision by a Citizenship and Immigration Canada immigration officer (the officer) dated March 28, 2012, wherein the applicant's permanent residence application was refused on the grounds that she did not have a genuine marriage with her sponsor.

[2] The applicant requests that the officer's decision be set aside and the application be referred for redetermination by a different officer.

### **Background**

[3] The applicant is a citizen of China. She came to Canada on July 5, 2006 on a tourist visa. She made a claim for refugee protection in November 2008 based on death threats against her made by loan sharks in China.

[4] On January 29, 2009 she met her husband, a permanent resident of Canada. He proposed to her in December 2009 and they were married on March 30, 2010. In August 2010, the applicant submitted an application for permanent residence sponsored by her husband. She withdrew her refugee claim on January 24, 2011 to avoid having two simultaneous applications.

[5] She and her husband were interviewed by the officer on March 26, 2012.

### **Officer's Decision**

[6] In a letter dated March 28, 2012 the officer informed the applicant her application had been refused on the basis of subsection 124(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, which requires both that the applicant foreign national be the spouse or common-law partner of the sponsor and that the applicant cohabit with the sponsor. The officer noted that during the interview, the applicant and her sponsor had inconsistent responses regarding the

relationship between the applicant and the sponsor's children. While the applicant had said the children did not attend their wedding due to having to attend school, the sponsor indicated his children were not aware of the marriage. The applicant stated the couple had last spent time with the children on January 22, 2012, while the sponsor stated his children had never met the applicant or visited their residence. The applicant explained the discrepancy by indicating the children had visited when her sponsor was not at home. The officer was not satisfied with this explanation.

[7] The officer's notes provide the reasons for the decision. The notes and certified tribunal record documents indicate that Canada Border Services Agency (CBSA) officers visited the applicant's address on March 8, 2012 based on previous reports that a bawdy house was operating there. The CBSA officers' observations were consistent with this opinion.

[8] The officer indicated he had asked the applicant and her sponsor in the interview about the result of the CBSA visit. Both indicated they lived in the basement unit and had no idea how the upstairs of the house was set up. The officer noted neither had provided any supporting documentation confirming their residence in the basement of that address and that their previous documentation and applications had not specified a basement apartment.

[9] The officer concluded on a balance of probabilities, that the applicant and the sponsor had failed to establish that their marriage was not entered into primarily for the purpose of acquiring status under the Act. Therefore, the application for permanent residence was refused.

**Issues**

[10] The applicant submits the following points at issue:

1. Did the officer fail to observe the principle of natural justice, procedural fairness or other procedure that it was required by law to observe?
2. Did the officer ignore some relevant information presented?
3. Did the officer base the decision on an erroneous finding of fact?
4. Did the officer make a decision in a perverse or capricious manner or without regard to material before it?

[11] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the officer violate procedural fairness?
3. Did the officer err in denying the application?

**Applicant's Written Submissions**

[12] The applicant submits the appropriate standard of review is correctness when determining whether a decision maker relied on inappropriate criteria when determining the validity of a marriage.

[13] The applicant argues the officer violated procedural fairness by not requesting further documentation or allowing the applicant to know ahead of her interview that the CBSA officers had

visited the house. She was denied the opportunity to know and respond to the concerns. The officer did not send a fairness letter giving the applicant knowledge of the concerns about whether she and her husband live in the basement of the premises. The applicant was not given an opportunity to explain. The information regarding the CBSA visit was obtained on March 8, 2012, so there was ample time to provide a fairness letter before the interview. The applicant argues that had she been notified, she would have provided a MLS listing, Google Map, pictures of the building, landlord's letter, neighbours' letters and other documentation.

[14] The applicant also argues the officer overlooked the fact that in her Form IMM-5285 questionnaire, she described her landlord coming to the basement to talk to her. The officer stated that all documentation that referred to their address did not refer to a basement apartment but overlooked this document.

[15] The applicant argues the officer was biased against the applicant based on the information provided by the CBSA suggesting the main floor of the house was a brothel, even though the main floor is irrelevant to the premises occupied by the applicant. The officer was selective in assessing the evidence as shown by the failure to notice the reference to the basement as described above. An apprehension of bias is a reviewable error.

[16] The applicant argues the CBSA report is in error since the officers never visited the apartment where she and her husband live. They questioned a new tenant.

[17] The applicant submits that the officer's notes reveal only a single discrepancy, regarding the applicant's relationship with her sponsor's children. The officer overlooked the fact that all questions relating to the relationship between the applicant and her sponsor were answered correctly and without hesitation. This fact also suggests the officer's bias.

[18] In conclusion, the applicant argues the decision was unreasonable and breached procedural fairness.

### **Respondent's Written Submissions**

[19] The respondent argues the officer's determination must be reviewed on a reasonableness standard, as the genuineness of the marriage is a question of fact. The respondent submits that the officer was reasonable in refusing the application on the basis of credibility.

[20] The respondent describes the officer's decision as based on the inconsistencies in responses between the applicant and her sponsor pertaining to the applicant's relationship with her sponsor's children. The respondent argues the applicant had an opportunity to respond to the allegation concerning the CBSA visit, but there was no documentation to substantiate the explanation that they rented the basement. The applicant's narrative in the questionnaire did not explain that the sponsor moved into the basement with the applicant after their marriage. The respondent argues the applicant's issue with the officer's decision is the weighing of evidence, which does not raise an arguable issue.

[21] The respondent maintains that the officer was not required to seek further documentation from the applicant or send a fairness letter. So long as the applicant was made aware of the officer's concerns at the interview, there was no requirement to disclose the particulars of the visit.

[22] Finally, the respondent argues the threshold for bias is high and has not been made out.

### **Analysis and Decision**

#### [23] **Issue 1**

##### What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 57, [2008] 1 SCR 190).

[24] The genuineness of a marriage is a question of fact reviewable on the reasonableness standard (see *Singh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 23 at paragraphs 16 and 17, [2012] FCJ No 43).

[25] In reviewing the officer's decision on the standard of reasonableness, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47 and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339). As the Supreme Court held in *Khosa* above, it is not up to a

reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[26] It is trite law that the appropriate standard of review for issues of procedural fairness is correctness (see *Khosa* above, at paragraph 43). No deference is owed to decision makers on these issues (see *Dunsmuir* above, at paragraph 50).

[27] **Issue 2**

Did the officer violate procedural fairness?

Both parties agree that the applicant was entitled to know the allegation underlying the officer's concern about her residence and have an opportunity to respond to the allegation. The question is whether adequate opportunity was in fact given.

[28] The authorities relied on by the respondent relate to cases where allegations were put to the applicants and they had a chance to respond, but the decision maker was not satisfied with their explanation (see for example *Wang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 812 at paragraphs 11 to 13, [2011] FCJ No 1013). This occurred here. However, the officer in this case did not simply solicit an oral explanation; he requested documentary evidence in the interview, asking the applicant whether she could provide a letter from her landlord confirming that she lived in the basement unit. The applicant had none. Given that she had only just learned of the allegation that she lived on the main floor, it is not surprising that she had no such documentary proof on her person.



[29] The officer's question clearly indicates that he considered documentary evidence probative to the question of where the applicant lived. Indeed, both his decision and the respondent's submissions in this judicial review emphasize the lack of documentary evidence provided by the applicant as to her basement dwelling. Yet, he made his decision without giving the applicant the opportunity to secure such evidence. Therefore, the opportunity to respond to the allegation against the applicant was inadequate. To request oral evidence in an interview without prior notice is perfectly fair, as described above, but to request the production of documentary evidence on demand is not procedurally fair when there is no reason for an applicant to carry such documents on her person.

[30] I would also note that the CBSA report confirmed there were three separate units in the house and that the alleged brothel only operated on the main floor unit. There is no evidence anywhere in the record that the applicant lived on the main floor; rather, the only evidence pertaining to habitation in a particular unit was the anecdote in the applicant's application which indicated she lived in the basement. The officer appears to have inferred from the fact she used a street address without a unit specification in her application means that she must have lived in the impugned unit instead of the other two. Given the seriousness of the accusation, that the applicant's marriage is a sham, this is hardly compelling evidence.

[31] There also was information in the tribunal record that information from police reports as far back as 2008 relating to the property in question were before the officer. These were not disclosed to the applicant.

[32] As the applicant was denied the opportunity to provide the documentary evidence requested by the officer, procedural fairness was violated. Given the unconvincing nature of the extant evidence concerning her residence, it is far from clear that the officer would have rejected the application had the applicant been given the opportunity to respond to the request for a letter from her landlord.

[33] Because of my finding on this issue, I need not deal with the remaining arguments.

[34] The application for judicial review is allowed and the matter is referred to a different officer for redetermination.

[35] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that** the application for judicial review is allowed, the decision of the officer is set aside and the matter is referred to a different officer for redetermination.

“John A. O’Keefe”

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Judge

ANNEX

**Relevant Statutory Provisions**

***Immigration and Refugee Protection Act, SC 2001, c 27***

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

***Immigration and Refugee Protection Rules, SOR/2002-227***

124. A foreign national is a member of the spouse or common-law partner in Canada class if they

124. Fait partie de la catégorie des époux ou conjoints de fait au Canada l'étranger qui remplit les conditions suivantes :

(a) are the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada; ...

a) il est l'époux ou le conjoint de fait d'un répondant et vit avec ce répondant au Canada; ...

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3432-12

**STYLE OF CAUSE:** MONG AH SHADOW LAI  
- and -  
THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** May 9, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT OF:** O'KEEFE J.

**DATED:** May 29, 2013

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