Federal Court  Cour fédérale

Date: 20140120

Docket: IMM-3208-12

Citation: 2014 FC 53

Ottawa, Ontario, January 20, 2014

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

HAIBIN WU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This application for judicial review concerns a visa officer's refusal to grant the Applicant's application for permanent residence as the spouse of Yan Qin Jiang (his Second Wife). The Officer's decision is dated March 1, 2012 (the Decision) and he interviewed the Applicant and his Second Wife in February 2012 (the Interview).

[2] The first issue is the reasonableness of the Officer's conclusion that the Applicant's marriage to his Second Wife was undertaken primarily for immigration purposes. This case is

unusual because the negative Decision was made even though the Second Wife had had one child and was pregnant again at the time of the Interview.

[3] There is evidence that:

i. The Applicant and his Second Wife have operated a business together since 2009.

ii. The Applicant married his Second Wife in Canada in May 2011.

iii. The Applicant and his Second Wife began to live together in December 2009 and in April 2011 she had her first child.

[4] Notwithstanding this evidence, the Officer reached a negative decision. The Applicant says it should be set aside because:

i. The credibility findings were unreasonable;

ii. There was a problem with the interpretation; and

iii. The best interests of the children were not considered.

Issue 1: Credibility

[5] The Applicant, who is a failed refugee claimant, lied to the Officer in an earlier interview when he was asked about when his relationship with his first wife ended. It turned out that when the Applicant was interviewed in May of 2010 about his first wife's sponsorship application, he advised the Officer that he was in a genuine marriage with her. However in reality, by that time, he had asked his first wife for a divorce and had been living with his Second Wife for five months. At the hearing before me counsel for the Applicant conceded these facts which will be described as the "Lie".

[6] There were also inconsistencies in the evidence. The Applicant initially said that he proposed to his Second Wife after the first baby was born, but later he said he was unsure. The Second Wife, on the other hand, said that he had proposed twice and that both proposals had been made before the baby was born.

[7] The Applicant's eldest sister apparently lives with the Applicant and his Second Wife. However, the Applicant said that although he tried to persuade her to live in the basement, his sister insisted on living upstairs in their home. The Second Wife, on the other hand, said that the Applicant's sister lived in the basement and provided a drawing to show that the sister's room was adjacent to the room in which she and the Applicant slept. This inconsistency suggests that the Applicant and his Second Wife do not live together.

[8] In view of these unexplained inconsistencies and in view of the fact that this applicant will tell fundamental lies to stay in Canada, I cannot conclude that the Decision was unreasonable.

Issue 2: The Interpreter

[9] The Applicant selected an interpreter who spoke Mandarin and stated on the record that he understood the translation. As well, the Applicant never complained that he was having difficulty with the interpretation. He simply stated that he became confused and misunderstood towards the end of the Interview. In my view, this state of affairs developed, not because there were problems with the interpreter, but because he was unwilling to answer questions about his first wife because of the Lie referred to above.

Issue 3: The Best Interests of the Children

[10] The Applicant did not raise Humanitarian & Compassionate issues in the sponsorship application even though he is subject to a removal order. In other words, there is no suggestion that the children or their mother face difficulties of any kind. Nevertheless, the Applicant says that the Officer had a duty to consider the children's best interests and to make inquiries about how they would fare if their father were to be removed.

[11] The Applicant says that section 5.27 of IP 5 creates the duty and that the Officer should have treated the case as if an H&C exemption had been requested. The section reads as follows:

> **5.27. Inadmissibilities for which no exemption has been requested**
>
> See also Section 5. 25, Inadmissible applicants.
>
> During the Stage 1 or 2 assessments, a known or suspected inadmissibility may be identified, that is, an inadmissibility for which no exemption has been requested.
> This can occur during the review of a client's history in FOSS or though information provided by the applicant (e.g. on the IMM 5001) that suggests that either the applicant or a family member is inadmissible. In such cases, the officer may:
>
> - refuse the application based on the existence of the inadmissibility; or
> - the officer may use discretion to consider, on their own initiative, whether an exemption on H&C grounds would be appropriate.
>
> When the applicant does not directly request an exemption, but facts in the application suggest that they are requesting an exemption for the inadmissibility, **officers should treat the application as if the exemption has been requested**.
>
> | **Example:** It would be clear that the applicant is seeking an exemption for an inadmissibility without explicitly asking for it if |
> |---|

> the applicant has a criminal conviction and, in the submission, made a case as to why they should be exempted from that inadmissibility (e.g. they have served their time, are rehabilitated, have done community service, have full-time employment, etc.) the onus always rests on the applicant to make their case and it is the applicant who "bears the burden of proving any claim upon which he relies" (*Owusu v. MCI*, 2004 FCA 38).

[12] In my view this section does not apply because there was no inadmissibility at issue and therefore no suggestion that the Applicant might be requesting an H&C exemption. Accordingly, in this case the Officer was only required to assess the marriage under section 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

Certification

[13] No question was posed for certification.

ORDER

THIS COURT ORDERS that the application for judicial review is hereby dismissed.

"Sandra J. Simpson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE: HAIBIN WU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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REASONS FOR ORDER AND ORDER: SIMPSON J.

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