Federal Court Cour fédérale

Date: 20150724

Docket: IMM-3728-14

Citation: 2015 FC 905

Ottawa, Ontario, July 24, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

JIN JUAN HUANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction and Background

[1] The Applicant is now a 63-year-old citizen of China who applied for permanent residence through the consulate in Hong Kong. She was originally sponsored by her daughter, Yunong Wu, who lives in Windsor, Ontario. However, that application was rejected on May 23, 2012, because the Applicant had failed to prove that another woman she had declared to be her daughter was biologically related to her. In the meantime, the Applicant was in Canada as a

visitor and she met a man named John Manuel Anok in April, 2011. She married him on January 19, 2012. In January, 2013, the Applicant applied for permanent residence again, this time as a member of the spouse or common-law partner in Canada class with Mr. Anok, who is now 78 years old, as her sponsor. Immigration officials were concerned that the marriage might not be genuine and called them both in for an interview on February 27, 2014, where they were questioned separately.

[1] Following the interview, the immigration officer [Officer] rejected the application in a letter dated March 21, 2014. In the Global Case Management System [GCMS] notes, the Officer stated that the Applicant and her sponsor did not "share a level of financial and emotional interdependence expected of a genuinely married couple. I am also not satisfied that this is not a bad faith marriage entered into primarily for immigration purposes."

[2] The Applicant now seeks judicial review of the Officer's decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*], asking the Court to set aside the Officer's decision and order that the matter be redetermined by a different immigration officer.

[3] The application for judicial review was filed beyond the 15-day time limit prescribed by paragraph 72(2)(b) of the *Act*. Since the Applicant's request for an extension of time in her application for leave and for judicial review was not addressed in the order granting leave, the application judge takes jurisdiction over such request (*Deng Estate v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 59 at paragraph 17, 387 NR 170). This request for an

extension of time was not opposed by the Respondent. Accordingly, at the outset of the hearing of this matter, an order to retroactively extend the time for filing the present application until May 6, 2014, was made.

II. Issues

[4] The Respondent raises a preliminary issue about some paragraphs of the Applicant's affidavit filed as part of the application record, arguing that they should not be considered because they present new evidence which was not before the Officer when the decision was made. The general rule in this regard is that the evidentiary record for purposes of a judicial review application is restricted to that which was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraph 19, 428 NR 297 [*Association of Universities*]). Accordingly, the details about the Applicant's relationship with her ex-husband are not admissible as evidence since that information was not before the Officer when the decision was made. However, since the Applicant has alleged various procedural defects not apparent on the face of the record (*Association of Universities* at paragraph 20), some of this additional evidence adduced by the Applicant may be considered by the Court in reviewing the procedure by which the decision was rendered.

[5] The dispositive issue in this matter though is whether the Officer acted unfairly by failing to afford the Applicant a meaningful opportunity to address the Officer's concerns about the credibility of the evidence. The Officer deserves no deference on this issue and it is reviewable on a correctness standard (see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at

paragraph 43, [2009] 1 SCR 339 [*Khosa*]; *Mission Institution v Khela*, 2014 SCC 24 at paragraph 79, [2014] 1 SCR 502). A decision-maker such as the Officer must afford affected persons the procedural rights to which they are entitled, although sometimes an error will not attract relief if it "is purely technical and occasions no substantial wrong or miscarriage of justice" (*Khosa* at paragraph 43).

III. Was the Applicant treated fairly?

[6] In the GCMS notes, the Officer listed numerous concerns, notably as to: the inconsistencies or discrepancies in the Applicant's and her husband's answers; the Applicant apparently receiving social assistance for housing; her frequent travel to Windsor to visit her daughter and grandchildren; the Applicant seeming to know very little about her husband's private or personal life (e.g. his hobbies); her previous permanent residence application being refused due to non-compliance and misrepresentation, something which the Officer stated "undermines the credibility of the relationship"; her husband's economic plans and wanting someone to take care of him, which prompted the Officer to write that "it seems that sponsor's relationship to applicant is more like a caregiver"; and, lastly, not being satisfied that the stated genesis and development of the relationship demonstrated they were in a genuine relationship.

[7] I agree with the Applicant that it was procedurally unfair for the Officer not to apprise her of some of these concerns as they arose and not to offer her a meaningful opportunity to address such concerns.

[8] Furthermore, I disagree with the Respondent that the duty of procedural fairness was satisfied in this case merely by granting the Applicant an interview and did not require the Officer to tell the Applicant whenever her story diverged from that of her sponsor. The Officer's concerns in this case were not related to the sufficiency of the evidence but, rather, to the credibility of the Applicant herself and the genuineness of the marriage. The Officer here should have provided the Applicant with a meaningful opportunity to respond to the concerns in this regard.

[9] I acknowledge that this determination could be questioned. In *Dasent v Canada (Minister of Citizenship and Immigration)* (1994), [1995] 1 FCR 720, 87 FTR 282 (TD) [*Dasent* (TD)], Mr. Justice Marshall Rothstein reviewed a similar decision about the genuineness of a marriage in the context of an application for an exemption from the *Act* based on humanitarian and compassionate [H&C] grounds. In *Dasent* (TD), an officer refused the application because a different officer had interviewed the applicant and her spouse separately and concluded that their marriage was not genuine. Justice Rothstein decided that was unfair, explaining that "[i]f the failure to permit an applicant to respond to any perceived or apparent contradictions arising from information obtained in the absence of the applicant does not constitute a breach of a duty of fairness, it is difficult to see that there are any procedural safeguards applicable to [H&C] proceedings at all" (*Dasent* (TD) at 728). That decision, however, was reversed by the Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Dasent* (1996), 193 NR 303, 39 Admin LR (2d) 62 (CA) [*Dasent* (CA)], where it was determined (at paragraph 5) that inconsistent statements by a spouse in a separate interview are not extrinsic evidence which officers are required to disclose.

[10] Because of the doctrine of precedent, *Dasent* (CA) would ordinarily determine this matter in the Respondent's favour, at least insofar as procedural fairness did not, as the Respondent argues, require the Officer to tell the Applicant whenever her story diverged from that of her sponsor (*Dashtban v Canada (Citizenship and Immigration)*, 2015 FC 160 at paragraph 27). However, as the Supreme Court of Canada has recently noted, precedent "is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate' " (*Carter v Canada (AG)*, 2015 SCC 5 at paragraph 44, 384 DLR (4th) 14).

[11] I am satisfied that significant developments in the law of procedural fairness have implicitly overruled *Dasent* (CA). In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 22, 174 DLR (4th) 193 [*Baker*], the Supreme Court noted that the content of the duty of procedural fairness was variable, but that it was ultimately about ensuring that "administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, <u>with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker</u>" (emphasis added). If applicants do not know what evidence the decision-maker has before it, they have been denied the opportunity to fully present their views on that evidence. Indeed, it is generally the case that administrative tribunals "must not hold private interviews with witnesses … or … hear evidence in the absence of a party whose conduct is impugned and under scrutiny" (*Kane v Board of Governors of the University of British Columbia*, [1980] 1 SCR 1105 at 1113-1114, 110 DLR (3d) 311[*Kane*]). Although *Kane*

involved a much more formal administrative process than the one under review, the reasons underlying this principle apply equally to the case at hand and were eloquently expressed by Justice Rothstein in *Dasent* (TD) at 728.

[12] This conclusion is reinforced by the Federal Court of Appeal's decision in *Chu v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 113, 270 NR 149 [*Chu*]. While *Chu* is not factually on point (since it was about danger opinion proceedings under subsection 70(5) of the old *Immigration Act*, RSC 1985, c I-2), Justice Rothstein found that it was unfair not to disclose to the appellant extrinsic materials submitted by officials acting in an adversarial role (*Chu* at paragraph 10). Most important for present purposes though, Justice Rothstein reached that conclusion by finding that several prior decisions on extrinsic evidence had been overtaken by *Baker*, including *Nadarajah v Canada (Minister of Citizenship and Immigration)* (1996), 112 FTR 296 at paragraph 7, 33 Imm LR (2d) 234 (TD), where the scope of extrinsic evidence had been limited by expressly following *Dasent* (CA).

[13] Following *Dasent* (CA) also does not support the virtues of consistency or predictability, two of the main principles underlying the doctrine of *stare decisis*. Although *Dasent* (CA) has occasionally been followed by this Court since *Baker* (see e.g. *Singh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 673 at paragraph 13, 73 Imm LR (3d) 21), it is inconsistent with the bulk of this Court's recent jurisprudence. In many other contexts, this Court has recognized that it is unfair for an officer not to seek to clarify any potential misunderstandings "in cases where the evidence would have been sufficient had it not been for doubts regarding the credibility, accuracy or genuine nature of information submitted by the

applicant in support of his or her application" (see: *Bar v Canada (Citizenship and Immigration)*, 2013 FC 317 at paragraph 29).

[14] In my view, maintaining an arcane exception for spousal interviews is unwarranted in cases where an applicant's credibility is an issue. There is nothing particularly unique about spousal interviews which would warrant such special treatment. Although applicants may present their spouses as witnesses to the genuineness of their marriage, this does not mean they should be presumed to know exactly how their spouses will respond to every question.

[15] In *Grewal v Canada (Minister of Employment and Immigration)* (1993), 62 FTR 308 (TD), the practice was justified on the basis that interviews should be conducted separately to avoid collusion, and it would "frustrate this process to allow the Applicant and his witnesses to restate their position once confronted with discrepancies." I acknowledge that it makes sense to interview spouses separately where concerns arise about the genuineness of their marriage. However, that does not mean that applicants must also be denied knowledge of what their spouse said and not be afforded some opportunity to argue that the officer had misunderstood their statements. Once the spouses have been interviewed separately, there is no longer any danger of collusion. If an applicant or his or her spouse should try to retract any of their statements when confronted with inconsistencies, this could simply affect their credibility.

[16] A duty to confront the spouses with any inconsistencies would also not be unduly onerous. It would usually just add a few extra minutes to the end of an interview. This is something which appears to be not unusual (see e.g. *Singh v Canada (Citizenship and*

Immigration), 2012 FC 23 at paragraph 7, 403 FTR 271; *Rahman v Canada (Citizenship and Immigration)*, 2013 FC 877 at paragraphs 8 and 10; *Ossete Ngouabi v Canada (Citizenship and Immigration)*, 2013 FC 1269 at paragraph 9; *Lin v Canada (Citizenship and Immigration)*, 2015 FC 53 at paragraphs 9 and 31).

[17] Finally, the breach of procedural fairness in this case was material. Had the Applicant been confronted with the supposed inconsistencies, she might have been able to convince the Officer that they were just misunderstandings. For instance, the Officer wrote that the Applicant said "they met in April, one month [later] they moved in together, there are discrepancies when [the sponsor] stated that they waited a year before they married and lived together." However, the sponsor had said that "[w]e met, she went back to her daughter, she occasionally came to visit me on and off over a year. Then, I made arrangement to include her into my apartment." This, in essence, was consistent with the Applicant's declaration about their relationship in her spouse/common-law questionnaire, where she stated that from May 7, 2011, until the present, "sometimes I live with my husband in Scarborough, sometimes I go back to Windsor to visit my daughter's family." Her detailed declaration showed that she had spent only 39 days living in her husband's home between May 7, 2011, and the date of their marriage on January 19, 2013, and that they had spent one of their months together visiting the Applicant's daughter. As such, the supposed inconsistency in their testimony could simply be a difference in how they characterized their living arrangements during this time. Although the Officer also expressed other reasons for rejecting the application, it is impossible to know whether the Officer's decision would have been different had the Officer asked for clarifications regarding any of his or her doubts.

IV. Conclusion

[18] This application for judicial review is therefore allowed and, consequently, the Applicant's application for permanent residence is remitted to a different immigration officer for redetermination, with leave to the Applicant to submit any further information upon such redetermination.

[19] There are no special circumstances which justify an award of costs (*Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 22).

[20] Neither party raised a question of general importance for certification; so none is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the application for permanent residence is remitted to a different immigration officer for redetermination, with leave to the Applicant to submit any further information upon such redetermination.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3728-14
STYLE OF CAUSE:	JIN JUAN HUANG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 21, 2015
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	JULY 24, 2015

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