Date: 20061219

Docket: IMM-1541-06

Citation: 2006 FC 1495

BETWEEN:

Chy DEUK

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

Pinard J.

[1] This is an application for judicial review of a decision dated February 27, 2006, by the Immigration Appeal Division of the Immigration and Refugee Board (IAD), refusing the sponsored application for permanent residence in Canada submitted by the applicant's spouse.

[2] In December 2000, Chy Deuk (the applicant) met Linda Pen in Cambodia, and they married in January 2001.

[3] In April 2001, the applicant applied to sponsor his spouse, but this application was denied by B. Mischuk of the Canadian High Commission in Singapore in December 2001. Officer Mischuk found that the marriage had been entered into primarily for the purpose of gaining admission into Canada, and not with the intention of residing permanently with the other spouse.

[4] On March 18, 2003, the IAD dismissed the appeal of officer Mischuk's decision, concluding that the applicant had failed to establish that his spouse was not a person who entered into the marriage primarily for the purpose of gaining admission into Canada under subsection 4(3) of the *Immigration Regulations, 1978*, SOR/78-172.

[5] In April 2004, another visa officer refused a new sponsorship application. At the time of submitting this request for reconsideration, the applicant's spouse provided the visa officer with evidence of telephone communications, letters, photos and transfers of money, as well as a copy of the plane ticket the applicant had used for his trip to Cambodia in August 2003.

[6] On February 27, 2006, the IAD dismissed the appeal of this decision on the ground of *res judicata*. This is an application for judicial review of that decision.

* * * * * * * * * * * *

[7] This proceeding raises the following issue: did the IAD err in finding that there were no exceptional circumstances to justify not applying the doctrine of *res judicata*?

[8] The applicant concedes that the three essential criteria for *res judicata* are present. The decision by the IAD on the first appeal was final, the parties are the same and the issue is the same. The applicant contends that even if all the conditions for *res judicata* have been met in this case, the doctrine does not apply where there are special circumstances (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 and *Apotex Inc. v. Merck & Co.*, [2003] 1 F.C. 242). The applicant also submits that the Supreme Court of Canada held in *Danyluk* that the doctrine of *res judicata* is not to be applied mechanically.

[9] In short, the applicant contends that there were special circumstances in this case that warranted a review of the matter without applying *res judicata.*

[10] For his part, the respondent submits that the three necessary requirements for *res judicata*, as stated by the Supreme Court of Canada in *Danyluk*, above, exist in this case.

[11] The respondent does not deny that the filing of fresh evidence constitutes an exception to *res judicata*, but maintains that this evidence must establish the intention of the spouses at the time they entered into the marriage, not their intention in 2006 (the respondent refers to *Mohammed v. Minister of Citizenship and Immigration*, 2005 FC 1442 and *Kaloti v. Minister of Citizenship and Immigration*, [2000] 3 F.C. 390).

[12] The respondent argues that the IAD was entitled to apply *res judicata* based on its finding that the applicant's fresh evidence failed to establish the *bona fides* of the January 2001 marriage.

* * * * * * * * * * * *

[13] The Supreme Court of Canada stated the following about *res judicata* in *Danyluk*, above, at paragraph 25:

> The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle, supra* at p. 254:
>
> (1) that the same question has been decided;
> (2) that the judicial decision which is said to create the estoppel was final; and
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[14] The parties in this proceeding agree that these three requirements have been met, and that the filing of fresh evidence constitutes an exception to the doctrine of *res judicata*.

[15] The standard of review applicable to the IAD decision as to whether there were particular circumstances justifying a departure from the *res judicata* doctrine is patent unreasonableness. In *Mohammed, supra*, my colleague, Mr. Justice Shore, stated:

> [19] Whether there are special or particular circumstances warranting the non-application of the *res judicata* principle is a purely factual question, which pertains therefore to the expertise of the administrative decision-maker. Consequently, the patently unreasonable nature of the error is the appropriate standard of review.

[16] The facts in *Mohammed* are similar to the facts in this proceeding: the applicant had submitted two sponsorship applications, which were refused, and she appealed to the IAD twice. The fresh evidence in *Mohammed* included photographs, communications between the spouses, letters of reference and documents pertaining to the spouses' banking affairs. In *Mohammed*, the Court

determined that the IAD had properly characterized these documents as “self-serving”, and that this fresh evidence was not determinative. The evidence adduced in this case is of a similar nature.

[17] In fact, the fresh evidence that the IAD considered consisted of photos, copies of money transfers and telephone bills. In the first appeal before the IAD, there were also copies of money transfers and telephone bills. The applicant alleges that the IAD should have considered the fresh evidence. I do not agree. It is clear from the decision that the IAD considered the evidence to be fresh evidence, but found it not determinative, because it was insufficient to establish the *bona fides* of the January 2001 marriage. In my view, it was not unreasonable that the IAD found the fresh evidence not determinative in the circumstances.

[18] In addition, the visa officer’s notes indicate that there was a significant difference in age between the applicant and his spouse, and that visits between them were very brief.

[19] Given that the fresh evidence adduced by the applicant was not conclusive, and that there are no exceptional circumstances to justify not applying the *res judicata* doctrine, the applicant has failed to establish that the assessment of the facts in the impugned decision is patently unreasonable. On the contrary, the decision appears completely reasonable to me. In the circumstances, there has been no breach of procedural fairness and no error of law in the application of *res judicata*.

[20] The application for judicial review is therefore dismissed.

"Yvon Pinard"

Judge

Ottawa, Ontario
December 19, 2006

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1541-06
STYLE OF CAUSE:	Chy DEUK v. MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 7, 2006
REASONS FOR JUDGMENT BY:	The Honourable Mr. Justice Pinard
DATED:	December 19, 2006

APPEARANCES:

Éveline Fiset	FOR THE APPLICANT
Michel Pépin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Éveline Fiset Montréal, Quebec	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT