Federal Court Cour fédérale

Date: 20090923

Docket: IMM-127-09

Citation: 2009 FC 955

Ottawa, Ontario, September 23, 2009

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

QIANG LIANG

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Background

[1] Mr. Qiang Liang is a Canadian citizen born in China. He immigrated to Canada and subsequently obtained his Canadian citizenship on September 29, 1997. He married Ms. Rong Ji Zeng in China on July 17, 2006 and consequently sponsored her application and that of her minor son by a previous marriage.

[2] A Designated Immigration Officer interviewed Ms. Rong Ji Zeng on April 3, 2007 at the Consulate General of Canada in Hong Kong and proceeded to an assessment of the application. This assessment resulted in the conclusion that Ms. Rong Ji Zeng did not meet the requirements for immigration to Canada as a member of the family class.

[3] The interview notes of the Officer raise many issues with regard to the credibility of the marriage from the perspective of Ms. Rong Ji Zeng, notably that she had little knowledge of her spouse, of his background, of his family composition, of his education level, and of his employment in Canada. She was unable to give details on how she met her spouse or on their relationship, nor could she describe her wedding day.

[4] Consequently the Officer was not satisfied that the relationship was genuine and was rather of the opinion that Ms. Rong Ji Zeng had married her sponsor primarily for gaining admission to Canada as a member of the family class and not with the intention to reside permanently in Canada with her spouse should admission to Canada be granted. Both Ms. Rong Ji Zeng and Mr. Qiang Liang were notified in writing of this refusal by letters dated April 4, 2007.

[5] Mr. Qiang Liang appealed to the Immigration Appeal Division against this decision pursuant to subsection 63 (1) of the *Immigration and Refugee Protection Act* (“Act”), S.C. 2001, c. 27. A hearing was eventually held on this matter on November 20, 2008 at which time Mr. Qiang Liang was heard on the appeal.

[6] In a decision dated December 22, 2008, a Panel of the Immigration Appeal Division allowed the appeal.

[7] The Minister of Citizenship and Immigration ("Minister") sought judicial review of this decision by the Federal Court and submitted an Application for leave and for judicial review pursuant to subsection 72(1) of the Act, and leave was granted by Justice Lemieux by Order dated June 17, 2009.

[8] Following the Application for leave, the Records Clerk of the Immigration and Refugee Board confirmed that the recording of the hearing held on November 20, 2008 could not be located.

[9] Though Mr. Qiang Liang was served with a copy of the Application for leave and for judicial review, he did not file a Notice of Appearance. He has not subsequently participated in the judicial review process and did not appear personally or through counsel at the hearing on this judicial review held in Montreal on September 15, 2009.

Issues

[10] The issues raised by the Minister were somewhat different in oral argument than those found in the Minister's Memorandum of Argument. For the purposes of these reasons, I will summarize the issues raised by the Minister as follows:

a. The Immigration Appeal Division erred in law by "assessing the genuineness of the relationship through only the Respondent's alleged intentions and by disregarding the wife's intentions" thus erring in law in its application of section 4 of the *Immigration*

and Refugee Protection Regulations, SOR/2002-227 (“Regulations”) which provides that “for the purposes of these Regulations, a foreign national shall not be considered a spouse […] of a person if the marriage […] is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.” (paragraphs 13 and 14, and 23 to 39 of the Applicant’s Further Memorandum of Argument);

b. The Immigration Appeal Division erred by reaching conclusions which were not supported by the evidence since the testimony of Mr. Qiang Liang was not credible (paragraphs 19 to 22 of the Applicant’s Further Memorandum of Argument).

[11] In regards to the credibility issue, the Minister adds that the absence of a transcript prevents the Court from dealing adequately with the matter, thus warranting in this case a new hearing.

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[12] The Minister states that on the first issue, this Court should review the matter on a standard of correctness, and on the second issue relating to credibility, it should review the matter on a standard of reasonableness.

Analysis

[13] I do not consider the first issue raised by the Minister to be a question of law, but rather one related to the manner in which the concerned Panel of the Immigration Appeal Division weighed the evidence before it. Consequently I am of the view that there is only one issue before this Court,

and that is, if the conclusion reached by the Panel was reasonable in light of the evidence before it. I will therefore review the decision on a standard of reasonableness.

[14] Concerning the absence of a transcript of the hearing, this raises an issue of natural justice which has been dealt with many times by this Court and which is governed by the principles set out by the Supreme Court of Canada in *SCFP v. Montreal*, [1997] 1 S.C.R. 793 and which are discussed further below.

[15] It is trite law that factual findings of administrative tribunals must not be disturbed on judicial review save exceptional circumstances. This Court must not revisit the facts or weigh the evidence (see among other *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 51 and 53: "Where the question is one of fact, discretion or policy, deference will usually apply automatically."; *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at para. 46: "More generally it is clear from s. 18.1(4)(d) (of the *Federal Courts Act*) that Parliament intended administrative fact finding to command a high degree of deference"); *SCFP v. Montreal*, *supra* at para. 85).

[16] This standard of review has consistently been held to apply to decisions of the Immigration Appeal Division concerning findings of fact or of credibility in the context of sponsorship applications: *Leroux v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 403, at para. 16 (Tremblay-Lamer J.); *Canada (Minister of Citizenship and Immigration)* v. *Navarrette*, 2006 FC 691, at para.17 (Shore J.); *Sanichara v. Canada (Minister of Citizenship and Immigration)*, 2005 FC

1015, at para. 11 (Beaudry J.); *Khangura v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 815, at para. 21 (O'Keefe J.).

[17] In this case, there are no detailed explanations or descriptions of the factual elements on which the Panel relied in order to allow the appeal. On the contrary, almost all the conclusions of the Panel regarding credibility lead to a result adverse to the one reached. Since there is no transcript of the hearing which would allow this Court to adequately dispose of the application for judicial review, and having regard to the particular circumstances of this case, a new hearing before another panel is warranted.

[18] The following factual findings of the Panel are particularly revealing:

a. While Mr. Qiang Liang declared having met his wife in August 2001 at his mother's funeral, his wife declared in her questionnaire that they first met in 2006. Mr. Qiang Liang offered an explanation of this inconsistency, but "the tribunal does not deem this explanation to be credible" (para. 7 of the Reasons for Decision);

b. Mr. Qiang Liang explained that his wife had come to this funeral at the request of his brother, a co-worker of his then wife to be. In this regard the Panel stated the following: "the tribunal questions why the appellant stated in the appeal record that the applicant first met his elder brother in 2004; the appellant was unable to offer any credible explanation for this inconsistency." (para. 8 of the Reasons for Decision);

c. With regards to the first meeting between the spouses, the Panel noted that Ms. Rong Ji Zeng had stated elsewhere in the record that they would recognize each other through photographs. Given that they had allegedly already met before, the Panel questioned why photographs were required for the spouses to recognize each other. The Panel concluded that Mr. Qiang Liang "was unable to offer a plausible explanation stating that perhaps she didn't recollect what he looked like. The tribunal notes that this explanation is not credible…" and "would seem to indicate that she had never seen the appellant before." (para. 11 of the Reasons for Decision);

d. The Panel also noted inconsistencies in regard to the presence of the wife's son at various events, such as at the first meeting of the couple in July of 2006 and at the wedding reception. The Panel concluded that Mr. Qiang Liang was "unable to offer a plausible explanation for this inconsistency" (para. 14 and 16 of the Reasons for Decision);

e. Mr. Qiang Liang was unaware of the fact that his wife had transferred to a new work location in September of 2008 even though he claimed very regular correspondence and communications with her, correspondence which was "not corroborated by the documentary evidence filed in support of this appeal." (para. 20 and 21 of the Reasons for Decision);

f. The Panel also noted that there were numerous contradictions and a fair number of unresolved inconsistencies in this case and recognized "the credibility issues *which remain unresolved*..." (para. 23 of the Reasons for Decision, emphasis added).

[19] The Panel nevertheless granted the appeal essentially for the reasons set out in paragraphs 17 and 23 of its Reasons for Decision:

> The appellant was very knowledgeable with regards to the applicant's relatives, jobs, employment history and address; that being said, *the tribunal cannot discount that such information could have been memorized*. The appellant nevertheless was able to corroborate almost all of the information contained in the appeal record. Overall, the tribunal found him to be a credible witness and believes that his intentions with regards to the applicant are sincere.
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> The tribunal notes that *there are numerous contradictions and a fair number of unresolved inconsistencies in this case* as noted hereinabove. Nevertheless, the tribunal believes that the appellant's intentions in marrying the applicant were genuine and undertaken in good faith. Considering the fact that the majority of the testimony given by the appellant corroborated the documentary evidence filed in support of this appeal; considering his knowledge of her family; considering the regular, on-going, albeit less frequent than alleged contact and communication between the appellant and his wife; accordingly, *despite the credibility issues which remain unresolved*, the tribunal feels that the appellant should be given the benefit of the doubt in this case." (Emphasis added).

[20] Moreover, the Panel only considered the genuineness of the relationship through the intentions of Mr. Qiang Liang and appears to have somewhat discounted the intentions of his wife Ms. Rong Ji Zeng. This is particularly disturbing in light of the fact that the Immigration Officer who interviewed her in Hong Kong had serious credibility issues with her, and it was these credibility issues (not those related to Mr. Qiang Liang) which were at the heart of the refusal and

which were the core issues in appeal: *Canada (Solicitor General) v. Bilsa,* [1994] F.C.J. No. 1785, at para. 9-10 (Denault J.); *Canada (Minister of Citizenship and Immigration v. Navarette*, 2006 FC 691, at para. 18 to 23 (Shore J.).

[21] In support of the judicial review application, the Minister submitted the affidavit of Arianne Cohen who represented the Minister in the appeal before the Panel. In this affidavit Ms. Cohen noted that the Minister had asked that the appeal be rejected in light of the numerous contradictions and credibility issues in the testimony of Mr. Qiang Liang and on the basis that the issue at stake was the credibility of his wife, who had not been called to testify by the appellant. Ms. Cohen states in her affidavit that persons who are not in Canada may testify before the Immigration Appeal Division through teleconferencing and that she has personally been present in many instances where testimony was heard by telephone communications before this Division.

[22] Concerning the absence of a transcript, it is conceded by the Minister that neither the Act nor the Regulations require that a transcript be prepared or a recording be made of a hearing before the Immigration Appeal Division. In such circumstances, the applicable legal principles are those stated by Justice L'Heureux-Dubé (for a unanimous bench of the Supreme Court of Canada) in the case of *SCFP v. Montreal*, *supra* at para. 81:

> In the absence of a statutory right to a recording, courts must determine whether the record before it allows it to properly dispose of the application for appeal or review. If so, the absence of a transcript will not violate the rules of natural justice. Where the statute does mandate a recording, however, natural justice may require a transcript. As such a recording need not be perfect to ensure the fairness of the proceedings, defects or gaps in the transcript must be shown to raise a "serious possibility" of the denial of a ground of

> appeal or review before a new hearing will be ordered. These principles ensure the fairness of the administrative decision making process while recognizing the need for flexibility in applying these concepts in the administrative context.

[23] These principles reflect to a large extent those set out by the Federal Court of Appeal in *Kandiah v. Minister of Employment and Immigration* (1992), 141 N.R. 232 and which were discussed and approved by the Supreme Court of Canada in *SCFP v. Montreal*, *supra* at para. 76 to 80. In *Kandiah* the Federal Court of Appeal found that in the absence of an express statutory requirement, the lack of a transcript or recording of an administrative tribunal's proceedings (in that case the Refugee Division of the Immigration and Refugee Board) did not in and of itself vitiate a decision of the concerned administrative tribunal. It held that if the evidence could be established through other means, such as by affidavit, the principles of natural justice would not be infringed, but that in appropriate circumstances the absence of a record could constitute a breach of natural justice. As stated in *SCFP v. Montreal*, *supra* at para. 80:

> In my view, the decisions in *Kandiah* and *Hayes*, *supra*, provide an excellent statement of the principles of natural justice as they apply to the record made of an administrative tribunal's hearing. In cases where the record is incomplete, the denial of justice allegedly arises from the inadequacy of the information upon which a reviewing court bases its decision. As a consequence, an appellant may be denied his or her grounds of appeal or review. The rules enunciated in these decisions prevent this unfortunate result. They also avoid the unnecessary encumbrance of administrative proceedings and needless repetition of a fact-finding inquiry long after the events in question have passed.

[24] The recent case law from the Federal Court indicates that where the fundamental issues at stake concern the reasonableness of the assessment of the credibility of a witness by an

administrative tribunal, and where the absence of a record of the testimony of the concerned witness leads to the conclusion that the Court cannot deal adequately with the concerns raised, then a new hearing may be required: *Agbon v. Canada (Minister of Citizenship and Immigration*, 2005 FC 356, at paras. 3-4 (O'Reilly J.) ; *Singh v. Canada (Minister of Citizenship and Immigration*, 2004 FC 426, at para. 3 (Beaudry J.); *Nguigi v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 432, at paras. 47-49 (Russell J.); *Khaira v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1071, at paras. 14 to 16 (Blais J., now C.J. F.C.A.); *Vergunov v. Canada (Minister of Citizenship and Immigration)*, (1999), 166 F.T.R. 94, at paras. 13-14 (Pelletier J.); *Ahmed v. Canada (Minister of Citizenship and Immigration)*, (2000), 182 F.T.R. 312, at para. 18 (Dawson J.).

[25] In this case, there are serious credibility issues raised by the Minister and confirmed by the Panel in regards to the testimony of Mr. Qiang Liang, issues which seem to lead to the conclusion that the Panel's decision is not reasonable in these circumstances. However, the Court cannot fully and adequately review these issues since a transcript of the proceedings is not available. Moreover, there are also important credibility issues raised by the Immigration Officer in regards to Ms. Rong Ji Zeng and, in the absence of a transcript of the proceedings before the Panel, the Court has no basis on which to review how and why the Panel disregarded these issues.

[26] Consequently I allow the application for judicial review and refer the matter to another Panel of the Immigration Appeal Division for re-determination.

[27] No certified question was proposed and none is warranted in this case.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed; and

2. The matter is returned for a new hearing and re-determination before a different Panel of the Immigration Appeal Division.

"Robert M. Mainville"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ms. Patricia Nobl	FOR THE APPLICANT
No appearance	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Nil	FOR THE RESPONDENT