

**Date: 20081126**

**Docket: IMM-1202-08**

**Citation: 2008 FC 1322**

**Ottawa, Ontario, November 26, 2008**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**ANDRAS DIOS  
EMMA ILONA SZALAY DIOS**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application pursuant to s. 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of an Immigration Officer (Officer), dated March 6, 2008 (Decision), refusing the Applicants' application for permanent residence under the Spouse or Common-law Partner in Canada Class.

## **BACKGROUND**

[2] Andras Dios (Principal Applicant) was born in Romania and has citizenship in both Romania and Hungary. He has lived in Canada continuously since arriving on April 18, 2001 at Toronto Pearson Airport, where he made a refugee claim. An eligibility certificate was issued August 8, 2001. He runs a construction and renovation business in Toronto.

[3] On February 1, 2002, the Principal Applicant began living with Emma Dios, who became a Canadian citizen on May 10, 1972. On July 6, 2002, the couple were married and have lived together continuously since February 1, 2002.

[4] The Principal Applicant's refugee claim was denied on December 9, 2003. Application for leave and judicial review was denied in March 2004.

[5] On October 1, 2005, the Principal Applicant made a Spouse in Canada application for permanent residence with his spouse as his sponsor. The supporting documentation included banking, insurance and other documentation confirming the marriage relationship, including a bank power of attorney by the Principal Applicant in favour of his spouse and an insurance policy with his spouse as the named beneficiary.

[6] A letter dated August 24, 2006 from the Respondent's representative in Vegreville advised that the Principal Applicant's application for permanent residence had been transferred to a local

office in Toronto for further assessment, and that he might be contacted for an interview or to seek additional information or clarification.

[7] On October 12, 2007, a letter was sent to the Applicants requesting additional information to show that the Applicants did not live in subsidized housing.

[8] On October 22, 2007, the Principal Applicant's spouse responded to the Officer's letter and provided the requested documentation. They received no response and retained legal counsel. Counsel wrote to the Officer and requested further information on the status of the Applicants' application on February 12, 2008.

[9] A notice was received on February 25, 2008 by the Applicants that a negative determination had been made on the application.

[10] After the present application was commenced, the Officer's reasons were provided to the Applicants in a letter dated April 29, 2008.

[11] The Principal Applicant is involved in litigation with Irene Balla in which Ms. Balla contends that she met the Principal Applicant in May 2002 when he was already engaged to his spouse. Ms. Balla says she had an affair with the Principal Applicant from late autumn of 2002 until November 2003 while he was married. The Principal Applicant denies that he made any propositions to Ms. Balla or that he was involved in the alleged relationship. He alleges that the

pleadings of the action with Ms. Balla relate to financial and business matters unconnected to the alleged personal relationship. On May 27, 2008, a Pre-Trial hearing was held, in which no resolution to the matter was reached.

[12] Neither the Principal Applicant, his spouse, his children or his lawyer were contacted prior to the Decision being made by the Officer, with the exception of a phone call received by the Principal Applicant's spouse asking if she knew Irene Balla. The Principal Applicant's spouse responded that Ms. Balla was a former friend.

#### **DECISION UNDER REVIEW**

[13] The Officer, in a letter dated February 25, 2008, found that, in order to become a permanent resident under the Spouse or Common-law Partner in Canada class, it is necessary to comply with the requirements specified in regulation 72(1)(e)(i) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations). It provides, with some exceptions, that a foreign national in Canada becomes a permanent resident if, following an examination, it is established that they and their family members, whether accompanying or not, are not inadmissible to Canada.

[14] The Officer found that the Principal Applicant had not shown that he met the requirements set out in subsection 72(1)(e)(i) of the Regulations, since he misrepresented information under subsection 40(1)(a) of the Act. Hence, his application was refused.

[15] The Officer's CAIPS notes, which constitute his reasons for the Principal Applicant's inadmissibility under subsection 40(1)(a) of the Act, contain the following:

That Andras Dios stated in genuine marriage to Emma Szalay a Canadian Citizen. Evidence has been presented to suggest that Andras Dios in a relationship with Irene Balla at the same time as marriage to Emma Szalay.

[16] The Officer also provides reasons in the Decision and rationale section of the application for Permanent Residence (APR) Narrative Form. They read in relevant part as follows:

...The issue of misrepresentation centered around the Applicant's statement and information that he provided indicating that he owned a property at 2525 MA Brown's Rd. in Port Perry, Ontario. He stated that he had a tenant at this property, when in fact that person was the rightful owner of the property. That person is Irene Balla, with whom the Applicant was having an intimate relationship with, while married to the sponsor, Emma Szalay. A letter from lawyer Bruce Machon was sent to the Applicant's file (by Irene Balla) dated 19JAN2004, which showed that, although title was taken in the name of the Applicant, Andras Dios, the property was intended for the sole benefit of Irene Balla. However, due to Irene's circumstances it was not practical to put the title in her name at that time. The property was registered in trust in Andras Dios name in order to secure a mortgage as Irene Balla did not qualify for one.

According to Irene Balla, the Applicant met her in 2003 and he married Emma Szalay in order to stay in Canada. In the meantime, he and Irene Balla were planning to spend their lives together. He promised that he would leave his wife as soon as he got his permanent status. The Applicant encouraged Irene to sell her mortgage free house in Stouffville and buy the farm at 2525 MA Brown's RD where he said he would help her to build a boarding kennel. As soon as the house was registered in his name he changed. Irene Balla states that he abused her verbally and mentally & threatened that he would take every penny she had and put her out on the street & kill her dogs.

On 23SEP2005 the decision maker, S. Bland, made the decision that the waiver that was granted on 8NOV04 was revoked and that his application for permanent residence was refused. I have reviewed the

file with regards to this matter, which is volume 1 of the current file at Etobicoke CIC. I agree with the Officer's assessment that the Applicant gained the original waiver through misrepresentation and that Mr. Dios is not in a genuine marriage with Ms. Szalay. I note that a report was written by the Officer on 23SEP05, under paragraph 40(1)(a) of IRPA for misrepresentation.

## **ISSUES**

[17] The Applicants raise the following issues:

- 1) The Officer erred in law by violating principles of procedural fairness and natural justice by:
  - i. Failing to provide the Applicants with notice of the determinative issue in the application and an opportunity to respond thereto and disabuse the Officer, despite specific requests made by the Applicants and by their counsel, thereby denying participatory and other rights to the Applicants;
  - ii. Failing to consider the merits of the application submitted and new evidence, and relying instead entirely on the questionable decision in a prior application that was approved then reopened and a negative determination made;
  - iii. As a result of the foregoing, fettering his discretion;
- 2) The Officer erred in law by failing to make a positive determination because there was no material evidence negating the same;
- 3) In the circumstances costs should be awarded to the Applicants.

## **STATUTORY PROVISIONS**

[18] The following provisions of the Act are applicable in these proceedings:

### **Misrepresentation**

**40. (1) A permanent**

### **Fausses déclarations**

**40. (1) Emportent**

resident or a foreign national is inadmissible for misrepresentation	interdiction de territoire pour fausses déclarations les faits suivants :
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
(b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;	b) être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations;
(c) on a final determination to vacate a decision to allow the claim for refugee protection by the permanent resident or the foreign national; or	c) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile;
(d) on ceasing to be a citizen under paragraph 10(1)(a) of the <i>Citizenship Act</i> , in the circumstances set out in subsection 10(2) of that Act.	d) la perte de la citoyenneté au titre de l'alinéa 10(1)a) de la <i>Loi sur la citoyenneté</i> dans le cas visé au paragraphe 10(2) de cette loi.

[19] The following provisions of the Regulations are also applicable in these proceedings:

<b>Becoming a permanent resident</b>	<b>Devenir résident permanent</b>
<b>72.</b> (1) A foreign national in Canada becomes a permanent resident if, following an examination, it is established that	<b>72.</b> (1) L'étranger au Canada devient résident permanent si, à l'issue d'un contrôle, les éléments suivants sont établis :
(a) they have applied to remain	a) il en a fait la demande au

in Canada as a permanent resident as a member of a class referred to in subsection (2);	titre d'une des catégories prévues au paragraphe (2);
(b) they are in Canada to establish permanent residence;	b) il est au Canada pour s'y établir en permanence;
(c) they are a member of that class;	c) il fait partie de la catégorie au titre de laquelle il a fait la demande;
(d) they meet the selection criteria and other requirements applicable to that class;	d) il satisfait aux critères de sélection et autres exigences applicables à cette catégorie;
(e) except in the case of a foreign national who has submitted a document accepted under subsection 178(2) or of a member of the protected temporary residents class,	e) sauf dans le cas de l'étranger ayant fourni un document qui a été accepté aux termes du paragraphe 178(2) ou de l'étranger qui fait partie de la catégorie des résidents temporaires protégés :
(i) they and their family members, whether accompanying or not, are not inadmissible,	(i) ni lui ni les membres de sa famille — qu'ils l'accompagnent ou non — ne sont interdits de territoire,
(ii) they hold a document described in any of paragraphs 50(1)(a) to (h), and	(ii) il est titulaire de l'un des documents visés aux alinéas 50(1)a) à h),
(iii) they hold a medical certificate, based on the most recent medical examination to which they were required to submit under these Regulations within the previous 12 months, that indicates that their health condition is not likely to be a danger to public health or public safety and, unless subsection 38(2) of the Act	(iii) il est titulaire d'un certificat médical attestant, sur le fondement de la plus récente visite médicale à laquelle il a été requis de se soumettre aux termes du présent règlement dans les douze mois qui précèdent, que son état de santé ne constitue vraisemblablement pas un danger pour la santé ou la sécurité publiques et, sauf si le



applies, is not reasonably expected to cause excessive demand; and

paragraphe 38(2) de la Loi s'applique, ne risque pas d'entraîner un fardeau excessif;

(f) in the case of a member of the protected temporary residents class, they are not inadmissible.

f) dans le cas de l'étranger qui fait partie de la catégorie des résidents temporaires protégés, il n'est pas interdit de territoire.

### **Alternative documents**

### **Documents de remplacement**

(2) A document submitted under subsection (1) shall be accepted in lieu of a document described in any of paragraphs 50(1)(a) to (h) if

178(2) Les documents fournis au titre du paragraphe (1) en remplacement des documents mentionnés aux alinéas 50(1)a) à h) sont acceptés si :

(a) in the case of an identity document, the identity document

a) dans le cas d'une pièce d'identité, la pièce, à la fois :

(i) is genuine,

(i) est authentique,

(ii) identifies the applicant, and

(ii) identifie le demandeur,

(iii) constitutes credible evidence of the applicant's identity; and

(iii) constitue une preuve crédible de l'identité du demandeur;

(b) in the case of a statutory declaration, the declaration

b) dans le cas d'une affirmation solennelle, l'affirmation, à la fois :

(i) is consistent with any information previously provided by the applicant to the Department or the Board, and

(i) est compatible avec tout renseignement fourni précédemment par le demandeur au ministère ou à la Commission,

(ii) constitutes credible evidence of the applicant's identity.

(ii) constitue une preuve crédible de l'identité du demandeur.

[20] The following provisions of the *Federal Court Rules*, SOR/98-106 are applicable in these proceedings:

<b>Discretionary powers of Court</b>	<b>Pouvoir discrétionnaire de la Cour</b>
<b>400.</b> (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.	<b>400.</b> (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.
<b>Crown</b>	<b>La Couronne</b>
(2) Costs may be awarded to or against the Crown.	(2) Les dépens peuvent être adjugés à la Couronne ou contre elle.
<b>Factors in awarding costs</b>	<b>Facteurs à prendre en compte</b>
(3) In exercising its discretion under subsection (1), the Court may consider	(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :
(a) the result of the proceeding;	a) le résultat de l'instance;
(b) the amounts claimed and the amounts recovered;	b) les sommes réclamées et les sommes recouvrées;
(c) the importance and complexity of the issues;	c) l'importance et la complexité des questions en litige;
(d) the apportionment of liability;	d) le partage de la responsabilité;
(e) any written offer to settle;	e) toute offre écrite de

	règlement;
(f) any offer to contribute made under rule 421;	f) toute offre de contribution faite en vertu de la règle 421;
(g) the amount of work;	g) la charge de travail;
(h) whether the public interest in having the proceeding litigated justifies a particular award of costs;	h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;
(i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;	i) la conduite d'une partie qui a eu pour effet d'abrèger ou de prolonger inutilement la durée de l'instance;
(j) the failure by a party to admit anything that should have been admitted or to serve a request to admit;	j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;
(k) whether any step in the proceeding was	k) la question de savoir si une mesure prise au cours de l'instance, selon le cas :
(i) improper, vexatious or unnecessary, or	(i) était inappropriée, vexatoire ou inutile,
(ii) taken through negligence, mistake or excessive caution;	(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;
(l) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;	l) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;

(m) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;

m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;

(n) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299; and

n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;

(o) any other matter that it considers relevant.

o) toute autre question qu'elle juge pertinente.

### **Tariff B**

### **Tarif B**

(4) The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.

(4) La Cour peut fixer tout ou partie des dépens en se reportant au tarif B et adjuger une somme globale au lieu ou en sus des dépens taxés.

### **Directions re assessment**

### **Directives de la Cour**

(5) Where the Court orders that costs be assessed in accordance with Tariff B, the Court may direct that the assessment be performed under a specific column or combination of columns of the table to that Tariff.

(5) Dans le cas où la Cour ordonne que les dépens soient taxés conformément au tarif B, elle peut donner des directives prescrivant que la taxation soit faite selon une colonne déterminée ou une combinaison de colonnes du tableau de ce tarif.

### **Further discretion of Court**

### **Autres pouvoirs discrétionnaires de la Cour**

(6) Notwithstanding any other

(6) Malgré toute autre

provision of these Rules, the Court may	disposition des présentes règles, la Cour peut :
(a) award or refuse costs in respect of a particular issue or step in a proceeding;	a) adjuger ou refuser d'adjuger les dépens à l'égard d'une question litigieuse ou d'une procédure particulière;
(b) award assessed costs or a percentage of assessed costs up to and including a specified step in a proceeding;	b) adjuger l'ensemble ou un pourcentage des dépens taxés, jusqu'à une étape précise de l'instance;
(c) award all or part of costs on a solicitor-and-client basis; or	c) adjuger tout ou partie des dépens sur une base avocat-client;
(d) award costs against a successful party.	d) condamner aux dépens la partie qui obtient gain de cause.

**Award and payment of costs**

**Adjudication et paiement des dépens**

(7) Costs shall be awarded to the party who is entitled to receive the costs and not to the party's solicitor, but they may be paid to the party's solicitor in trust.	(7) Les dépens sont adjugés à la partie qui y a droit et non à son avocat, mais ils peuvent être payés en fiducie à celui-ci.
--	---

**STANDARD OF REVIEW**

[21] The Applicants have raised procedural fairness issues that are reviewable under a standard of correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1 at paragraph 115.

[22] A denial of the opportunity to respond to an officer's concerns is a procedural fairness issue: *Rukmangathan v. Canada (Minister of Citizenship and Immigration)* 2004 FC 284 at paragraph 22. As *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at paragraph 100 states, "it is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Thus, questions of procedural fairness are not subject to the standard of review: *Nassima v. Canada (Minister of Citizenship and Immigration)* 2008 FC 688 at paragraph 10 and *Anbouhi v. Canada (Minister of Citizenship and Immigration)* 2008 FC 284.

[23] When dealing with the issue of extrinsic evidence, the Court does not need to engage in an assessment of the appropriate standard of review but would evaluate whether the rules of procedural fairness or the duty of fairness have been adhered to: *Edobor v. Canada (Minister of Citizenship and Immigration)* 2007 FC 883 at paragraph 24; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] S.C.J. No. 18; *Ha v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 174, 2004 FCA 49.

[24] In relation to whether the Officer fettered their Discretion, there is also no need to proceed with a "detailed analysis to determine the proper standard of review" since the issue must be examined by the "Court in light of the particular circumstances of the case." "If a breach of natural justice or procedural fairness is found by the Court, no deference will be due to the Board and the application to set aside the decision will be granted: *Kathiravelu v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1287 at paragraph 12.

[25] When dealing with a spousal in-Canada class permanent resident application, the past applicable standard has been reasonableness *simpliciter*: *Cao v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1408 at paragraph 24; *Singh v. Canada (Minister of Citizenship and Immigration)* 2006 FC 565 at paragraph 4 and *Mohamed v. Canada (Minister of Citizenship and Immigration)* 2006 FC 696 at paragraph 39.

[26] In *Dunsmuir v. New Brunswick* 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, “the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review” (*Dunsmuir* at paragraph 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of “reasonableness” review.

[27] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[28] Thus, in light of the Supreme Court of Canada’s decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the non-procedural fairness issues in this case to be reasonableness. When reviewing a decision on the standard of

reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir* at paragraph 47). Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

## **ARGUMENTS**

### **The Applicants**

#### **Violating Principles of Procedural Fairness and Natural Justice**

##### **(i) Failure to Notify Applicants and Provide Opportunity to Address the Issue Considered Determinative**

[29] The Applicants submit that the Officer made the Decision based on an issue in a prior determination without notice and without calling for any new evidence, without convening an interview and without seeking any clarification from the Applicants. The Applicants cite and rely upon *Baker* at paragraphs 21-25 as authority for when the duty of procedural fairness is owed by an immigration officer.

[30] The Applicants submit that, based upon *Baker*, the duty of fairness was triggered in this case for several reasons:

- 1) The participatory rights of the Applicants were breached because the Applicants did not have a meaningful opportunity to present their case freely and fairly, despite requests for such an opportunity;



- 2) The right of a husband and wife to remain together, especially a couple who has been together more than six years, is of paramount importance;
- 3) There is no appeal procedure and the Officer did not respond to further information requests by the Applicants and their counsel, thereby increasing the duty.

**(ii) Failure to consider the merits of the application submitted and new evidence and relying instead entirely on the questionable decision in a prior application that was approved, then reopened, and a negative determination made.**

[31] The Applicants submit that the Decision rests entirely on a former officer's decision in a prior application, without any inquiry into, or consideration of, new evidence. The only evidence addressed in the Decision to support the Officer's conclusion was the findings of the former officer which the Applicants summarize as relating to:

- (a) Who was the rightful owner of a property based on information provided by Irene Balla in the form of a letter from her lawyer without inquiry of or any corresponding material from the Principal Applicant's lawyer and despite the objection that had been registered by the Principal Applicant in their letter of April 11, 2005; and
- (b) Uncorroborated self-serving allegations from Irene Balla of a personal relationship with the Principal Applicant for a year in 2002 and 2003, including that he would leave his spouse for Irene Balla which is not only denied in the Principal Applicant's defence and counterclaim in the ongoing acrimonious litigation subsequent to officer Bland's decision between the Principal Applicant and Irene Balla, but also has been proven false because it has never happened.

[32] The Applicants submit that there is contradictory evidence in the litigation in process with Irene Balla that the Officer failed to address, or inquire into, as a result of certain errors, including the following:

- (a) That the Principal Applicant was the rightful owner of the said property as well as the registered owner, and was duped into signing a trust agreement in favour of Irene Balla by her lawyer and other associates that included the following circumstances.

The document in English was represented to be a security document to protect Irene Balla's financial contribution to her dog kennel business on the property from the Principal Applicant's spouse and not one relating to beneficial ownership of the property. The document was prepared by Irene Balla's lawyer and was not translated to the Principal Applicant before signing; the Principal Applicant had no ability to read or understand English and did not have independent representation; and the Principal Applicant continued to pay all mortgage and tax payments which, under the trust agreement were to be obligations of Irene Balla;

- (b) By way of counterclaim, the Principal Applicant claimed a declaration that the said trust agreement is null and void and the Principal Applicant is the sole legal and beneficial owner of the property with ownership to be vested in him as well as other relief;
- (c) The Principal Applicant categorically denied the alleged personal relationship with Irene Balla for a year in 2002 and 2003 or that he had ever made any propositions to her.

[33] The Applicants conclude on this point by stating that the Officer was not appropriately alive and sensitive to, or interested in, material new evidence, despite the indicia of the ongoing spousal relationship and timely requests to provide any additional information.

### **(iii) Fettering of Discretion**

[34] The Applicants submit that the discretion of an immigration officer is fettered when that officer acts upon irrelevant considerations, or acts in a manner which can be characterized as unfair, oppressive, or as demonstrating bad faith. The Applicants submit that, on this issue, the Officer erred on this ground.

### **A Positive Determination was Justified**

[35] The Applicants submit that had the Officer responded to inquires by, and on behalf of, the Applicants, or had he made appropriate inquiries as to the most current evidence and made an independent assessment based on that evidence, then the Decision would have been in favour of the Applicants.

### **Costs**

[36] The Applicants submit that the abuse of process in this case is of a flagrant and unconscionable nature that justifies an award of costs to the Applicants on a solicitor and client basis consistent with Rule 400 of the *Federal Courts Rules*. The Applicants say that costs are warranted because of the following factors:

- 1) Improper, vexatious or unnecessary actions by the Respondent;
- 2) Negligence or mistake by the Respondent;
- 3) Failure by the Respondent to admit mistakes;
- 4) The importance of the issues and needless complexity caused [by] the Respondent;
- 5) All work related to this application that should have been unnecessary.

### **The Respondent**

[37] The Respondent submits that section 4 of the Regulations requires a foreign national to demonstrate that the marriage is genuine and has not been entered into for the purpose of acquiring status under the Act. Therefore, the Applicant bore the onus of establishing the genuineness of his

marriage: *Chertyuk v. Canada (Minister of Citizenship and Immigration)* 2008 FC 1086 at paragraph 26 and *Mustafa v. Canada (Minister of Citizenship and Immigration)* 2008 FC 564 at paragraph 26.

[38] The Principal Applicant was aware that his first application was rejected because his marriage was found not to be genuine. Knowing the allegations made by Ms. Balla, the onus was on the Principal Applicant to prove that his marriage was genuine. The Respondent submits that the Officer weighed the evidence before her, including documents pertaining to the Principal Applicant's legal dispute with Ms. Balla over the ownership of 2525 MA Brown's Road. The evidence was insufficient to persuade the Officer that the Principal Applicant's marriage to Ms. Szalay was genuine and not entered into primarily for immigration purposes.

[39] The Respondent submits that the Officer considered all of the evidence before her. In her Decision, the Officer set out the history of the case, the original application, the events that caused the application to be re-opened and the evidence provided by Ms. Balla. The Officer was aware of the evidence on the file.

[40] The Respondent submits that there was evidence before the Officer that supported the finding that the Principal Applicant was not in a genuine marriage. The Applicants take issue with the weight assigned to the evidence but the Respondent submits that it is not the role of this Court to revisit the facts or to reweigh the evidence.

[41] The Respondent contends that the Applicants have not demonstrated that the Officer failed to consider the evidence. The Officer was not required to mention every piece of evidence in her reasons and she is assumed to have weighed and considered all of the evidence before her, unless the contrary is shown: *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.); *Hassan v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 946 (F.C.A.); *Chertyuk*; and *Donkor v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1089 at paragraph 22.

[42] The Respondent submits that the Officer was entitled to consider the decision of the previous officer and did not fetter her discretion by doing so. The fact that the Officer processed the Applicants' application in a manner consistent with an earlier assessment, does not mean that the Officer acted inappropriately: *Parmar v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1532 at paragraphs 40-41; *Shahwan v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 785 at paragraphs 20-21 and *Ahmed v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 499 at paragraphs 17-18.

[43] The Respondent concludes that while the Officer was required to decide the case on the basis of the evidence before her, it was acceptable for her to consult a previous decision: *Baber v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 1077 at paragraph 9. The Officer was presented with the same facts that were before the previous officer. Therefore, it is not surprising that he came to the same conclusion, namely that the Applicants were not in a genuine marriage.

[44] The Respondent points to the December 20, 2005 affidavit of the Principal Applicant where he denies having a relationship with Ms. Balla, while later on in that same affidavit he also admits that they had “some sexual contact on some occasions” when they had been drinking. This information was also before the previous officer when she rendered her decision. As well, in another letter to the Officer, the Principal Applicant explained that he and Ms. Balla were in a dispute over property and he admitted to having “sexual conduct” with her. The Principal Applicant has failed to show that the Officer relied on the previous officer’s decision to the exclusion of the other evidence before her.

[45] The Respondent disagrees with the Principal Applicant’s submission that the Officer did not consider the evidence of the legal dispute between Ms. Balla and the Principal Applicant over the ownership of 2525 Ma Brown’s Road. Specifically, the Principal Applicant claims that the Officer failed to consider various facts that are raised in the Principal Applicant’s Statement of Defence and Counterclaim in that case. The Respondent submits that those documents do not appear to have been before the Officer, as they are not on the certified record. The Respondent submits that even if this evidence had been before the Officer, it was evidence of the ownership of land and did not demonstrate that the Principal Applicant was in a genuine marriage to Ms. Szalay or that their marriage was not entered into primarily for immigration purposes.

[46] The Respondent further submits that the litigation with Ms. Balla is still pending before the Ontario Superior Court. No decision has been made. All the Principal Applicant has provided in his record is an Amended Statement of Claim and a Statement of Defence and Counterclaim. The fact

that the Principal Applicant denies having a relationship in his counterclaim with Ms. Balla does not establish that his marriage to his wife was genuine.

[47] The Respondent says there was no breach of procedural fairness in this case. The Respondent cites and relies upon *Rana v. Canada (Minister of Citizenship and Immigration)* 2007 FC 153 at paragraph 20 (F.C.) which considered an officer's reliance on an anonymous tip that led to the applicants' arrest two years prior to their humanitarian and compassionate application. The Court held that the letter was not extrinsic evidence since the applicants had known about it since 2000. The Court in *Rana* stated as follows at paragraph 20:

The officer's use of the poison pen letter does not amount to extrinsic evidence. The applicants have known about the poison pen letter since fall 2000. There is even documentation that seems to indicate that the letter was submitted during the special ad hoc hearing on November 2, 2000...It was therefore reasonable for the officer to use it for her analysis.

[48] The Respondent submits that Ms. Balla's letter is not extrinsic evidence since its existence was disclosed to the Applicant on two occasions. First, it was disclosed on April 7, 2005 when the previous officer wrote as follows:

As well, there is information you were in a relationship with Irene Balla and married Emma for the purpose of Immigration.

On July 14, 2005, the previous officer then confirmed as follows:

I have letters from several witnesses including a real estate agent who states you were in a romantic relationship with Irene Balla at the time you were purchasing this property.

In both letters, the Officer gave the Applicants the opportunity to respond before she rendered a decision. The Principal Applicant responded with a letter in which he

admitted to having sexual contact with Ms. Balla, but claimed that his marriage to Ms. Szalay was genuine.

[49] The Respondent further submits that the Principal Applicant was given a full opportunity to respond to Ms. Balla's allegations in his In-Canada Spousal Application.

[50] The Respondent submits that the Applicants have failed to show any reviewable error or breach of procedural fairness.

## **Analysis**

### **General**

[51] A review of the factual background to this case and the record of Mr. Dios' various attempts to gain permanent residence in Canada reveals that the Applicants have no grounds for the issues they raise in this application.

[52] The record reveals that all of the allegations made by Irene Balla and her lawyer against Mr. Dios have been laid before the Applicants who have been given ample time within which to respond and state their position.

[53] Officer Bland's decision of September 23, 2005 explains the situation fully and makes a definitive finding concerning the *bona fides* of the Applicants' marriage:



Based on the extensive documentary evidence before me, I am not satisfied Mr. Dios is in a bona fide marriage and believe he entered into the marriage for immigration purposes.

[54] Officer Bland's decision was not challenged by the Applicants, and they have done nothing in their dealings with immigration authorities and Officer Salmon to counter its findings and reasons concerning the lack of *bona fides* of their marriage.

[55] Two months after Officer Bland's decision, the Applicants simply made a new application for permanent residence for Mr. Dios in which they ignored the inconvenient evidence of Irene Balla and Officer Bland's decision concerning the lack of *bona fides* of their marriage.

[56] Having ignored a central issue for their permanent residence application, they now accuse Officer Salmon of various reviewable errors.

[57] However, based upon Officer Bland's decision and the Applicants' neglect of the central issue and their failure to discharge the onus upon them to establish the *bona fides* of their marriage, Officer Salmon had no basis upon which she could conclude other than she did:

On 23 September 2005 the decision maker, S. Bland, made the decision that the waiver that was granted on 8Nov04 was revoked and that his application for permanent residence was refused. I have reviewed the file with regards to this matter, which is volume 1 of the current file at Etobicoke CIC. I agree with the Officer's assessment that the Applicant gained the original waiver through misrepresentation and that Mr. Dios is not in a genuine marriage with Ms. Szalay. I note that a report was written by the Officer on 23Sep05, under paragraph 40(1)(a) of IRPA for misrepresentation.

[58] No attempt was made by the Applicants in their permanent residence application to persuade Officer Salmon that she should reach a different conclusion from Officer Bland on the *bona fides* of their marriage.

[59] They had the time and the opportunity to present any evidence and to make any argument they wanted to make on this issue, and to provide any updates on how their litigation with Irene Bella was proceeding.

[60] When the Applicants' present counsel was retained, his letter of February 12, 2008 simply asked Officer Salmon to "kindly advise the current status of this matter: if any additional information is required and, if not, when this matter can be completed."

[61] In other words, the Applicants wanted Officer Salmon to make a decision. They did not request more time or suggest that the file needed to be updated.

[62] Having received what they asked for from Officer Salmon on the basis of the information they knew was before her (which included the decision of Officer Bland on the lack of *bona fides* of their marriage which they had declined to challenge or counter), they now complain of procedural unfairness, failure to consider the merits and new evidence, improperly relying upon Officer Bland's decision, fettering of discretion and reliance on extrinsic evidence.

[63] What is more, they say that Officer Salmon has engaged in an abuse of process so egregious that they should be awarded costs on a solicitor/client basis.

### **Failure to Notify and Provide Opportunity to Address the Issue Considered**

#### **Determinative**

[64] The Applicants were given every opportunity to address the *bona fides* of their marriage, both before Officer Bland and Officer Salmon. Officer Bland's decision laid out the problem for them and, in their permanent residence application, they were entirely free to address and adduce evidence concerning this determinative issue. They simply failed to deal with the problem and acted as though it did not exist.

[65] The letter of February 12, 2008 from Applicants' counsel did not request additional time or suggest that any update was required for the decision to be made. In effect, it requests a decision from Officer Salmon on the basis of the file as it existed at that time. There was no obligation upon Officer Salmon to forewarn the Applicants on matters that could result in a negative decision. The onus is on the Applicants to demonstrate that their marriage is *bona fides*: section 4 of the *Immigration and Refugee Protection Regulations*; *Chertynk v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1086 and *Mustafa v. Canada (Minister of Citizenship and Immigration)* 2008 FC 564 at paragraph 26.

[66] The letter of October 12, 2007 requesting information about subsidized housing does not suggest that a positive decision can be expected. It is a simple request for information needed to complete the file and establish Emma Ilona Szalay Dios' ability to act as a sponsor. It does not suggest that the *bona fides* of the marriage has been established.

[67] Officer Salmon did not need to call for new evidence or direct an interview or request any clarification. Officer Salmon had before her the permanent residence application in the form, and containing the information that the Applicants wanted her to consider. In the letter of February 12, 2008 from Applicants' counsel, there is no suggestion that new evidence or clarification is needed for Officer Salmon to make the decision. The Applicants, after receiving a negative decision, are simply attempting to shift the onus which lies upon them.

[68] Officer Salmon's Decision is not simply based upon Officer Bland's decision. She explains that "I have reviewed the file with regards to this matter" and, having completed that review, she says that "I agree with [Officer Bland's] assessment that the Applicant gained the original waiver through misrepresentation and that Mr. Dios is not in a genuine marriage with Ms. Szalay." (emphasis added)

[69] Given the fact that the Applicants have ignored Officer Bland's findings and conclusions and have not questioned Officer Bland's decision in any proceedings, it is hardly surprising that Officer Salmon came to the same conclusions as Officer Bland concerning the Applicants' marriage. If the Applicants had wanted to persuade Officer Salmon that, notwithstanding Officer

Bland's decision, their marriage was genuine, then they had every opportunity to do so. In fact, the onus was upon them to take the initiative and they simply failed to address the issue.

[70] Consequently, there is no breach of procedural fairness on this case.

**Failure to Consider the Merits and Relying Entirely Upon the Questionable Decision  
in a Prior Application**

[71] There is nothing questionable about Officer Bland's decision. It was arrived at after a due consideration of all the relevant facts and after giving the Applicants a full opportunity to present evidence and argument on the marriage issue. Officer Bland's letter of July 14, 2005 sets out the whole situation for the Applicants and advises them as follows: "[b]efore a decision is made on this matter, you have the opportunity to provide any information you would like to be considered." The Applicants responded to this invitation and opportunity.

[72] Having given the Applicants a full opportunity to meet the case against them, Officer Bland made a definitive decision on the central issue of the lack of *bona fides* of their marriage, a decision that the Applicants have neither challenged or adequately addressed in their subsequent dealings with CIC and Officer Salmon:

Based on the extensive documentary evidence before me, I am not satisfied Mr. Dios is in a *bona fide* marriage and believe he entered into the marriage for immigration purposes.

There is a good possibility his wife, Emma, is unaware of her husband's true intentions.

[73] As pointed out above, Officer Salmon's Decision does not rest entirely on the decision of Officer Bland. Officer Salmon reviewed the file, which included the decision of Officer Bland, and came to the conclusion that there was nothing on the file to lead her to disagree with Officer Bland. The Applicants were responsible for ensuring that Officer Salmon had all of the information they wished to place before her on the issue of the *bona fides* of their marriage. They requested a decision. They received a decision.

### **Fettering of Discretion**

[74] Officer Salmon did not act upon irrelevant considerations in a manner that was unfair or oppressive, or which demonstrated bad faith, as alleged by the Applicants.

[75] Officer Salmon rendered the Decision based upon the information on the file and after due consideration of the permanent residence application made by the Applicants. She made an independent decision on the evidence that was before her.

[76] Officer Salmon did not fetter her discretion by reviewing a previous determination related to the Applicants. Officer Salmon was presented with essentially the same facts that had come before Officer Bland regarding the *bona fides* of the marriage. It is not surprising that she came to the same conclusion.

### **Extrinsic Evidence**

[77] At the hearing of this matter in Toronto, counsel for the Applicants brought up various documents that were allegedly used in the Decision and which the Applicants' claim were extrinsic.

[78] Because the written materials do not cover this point adequately the Court must be extremely cautious in dealing with this argument.

[79] There is no clear evidence before me that the Applicants did not receive the documents in question. They have known about them since the Certified Record was available, and have even submitted a further written memorandum of argument in which they could have identified the documents in question.

[80] However, my review of the documents in question suggests that the evidence is not extrinsic and simply refers to issues that the Applicants have long known about and have chosen not to address in their permanent residence application, or to which they provided a response back in 2005. The allegations are well-known by the Applicants and they have had every opportunity to deal with them.

[81] Officer Bland's decision remains entirely valid and the Applicants have simply declined to deal with the unchallenged conclusions concerning the lack of *bona fides* in their marriage.

[82] The status of the litigation between Mr. Dios and Ms. Bella is simply not relevant. Both Officer Bland and Officer Salmon have made findings concerning the Applicants' marriage after the Applicants have been given every opportunity to explain and substantiate their position on this central issue. As Justice Kelen pointed out in *Mustafa* at paragraph 26, "[t]he onus of establishing the *bona fides* of a marriage lies with the applicant."



**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that**

1. This Application is dismissed.
2. There is no question for certification.
3. No costs are awarded.

“James Russell”

---

Judge

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

**DOCKET:** IMM-1202-08

**STYLE OF CAUSE:** **ANDRAS DIOS**  
**EMMA ILONA SZALAY DIOS**  
**v.**  
**MCI**

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** October 21, 2008

**REASONS FOR JUDGMENT  
AND JUDGMENT:** JUSTICE RUSSELL

**DATED:** November 26, 2008

**APPEARANCES:**

Daniel M. Fine FOR THE APPLICANT

Asha Gafar FOR THE RESPONDENT  
Eleanor Elstub

**SOLICITORS OF RECORD:**

Mr. Daniel M. Fine  
BARRISTER AND SOLICITOR  
TORONTO, ONTARIO FOR THE APPLICANT

JOHN H.SIMS, Q.C.  
DEPUTY ATTORNEY GENERAL  
OF CANADA  
TORONTO, ONTARIO FOR THE RESPONDENT