Federal Court  Cour fédérale

Date: 20091214

Docket: IMM-2948-09

Citation: 2009 FC 1267

Ottawa, Ontario, December 14, 2009

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

ARMEL BIENVENUE MBOLLO

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of a decision by the Immigration Appeal Division of the Immigration and Refugee Board (the panel), dated April 15, 2009, refusing the sponsored application by the applicant's conjugal partner for a permanent resident visa. The applicant is self-represented in this matter.

Issue

[2] The following questions arise in this case:

- Was it reasonable for the panel to decide that the applicant and Ms. Dihouassila were not conjugal partners?
- Did the immigration officer err in law by not giving the applicant the opportunity to be heard in his language?

[3] For the following reasons, this application for judicial review will be dismissed.

Background

[4] The applicant, Armel Bienvenue Mbollo, left the Congo in 1986 and lived in Cuba from 1986 to 2001. He arrived in Canada as a refugee from the Republic of the Congo in 2001 and has been a Canadian citizen since March 30, 2006. He lives in Ottawa and works for the federal government.

[5] The applicant and Antoinette Guylène Nganda Dihouassila, a citizen of the Republic of the Congo, met in Cuba in 1996 when the applicant was a student and Ms. Dihouassila was on vacation. They met through her sister, who had gone to school with the applicant. At the end of her holiday, Ms. Dihouassila returned to the Congo with her family.

[6] The applicant subsequently visited Ms. Dihouassila in the Congo for three weeks during the Christmas holidays the same year, in 1996. Following that meeting in 1996, there was no contact between the applicant and Ms. Dihouassila until 2004, eight years later. The applicant says that he

lost contact with his spouse because of the conflict in the Congo. They found each other through the Internet when a mutual friend gave each of them the other's e-mail address.

[7] The applicant and Ms. Dihouassila began a romantic relationship in 2004, which developed through the exchange of e-mails and telephone calls. There was no physical contact between the applicant and Ms. Dihouassila during the period between the Christmas holidays in 1996 and the applicant's application to sponsor his spouse.

[8] The applicant submitted an application to sponsor Ms. Dihouassila in 2006. According to the sponsorship application, the couple's relationship had been that of conjugal partners since August 15, 2006. Among the documents submitted with the application was proof of money transfers from the applicant to his spouse. Between September 2004 and June 2006, the applicant sent approximately $1500 to Ms. Dihouassila, and he noted that the transfers continue to the present.

[9] A third meeting between the applicant and his spouse occurred in Ghana in 2007. This meeting took place after the sponsorship application and more than ten years after the Christmas holidays they spent together in 1996.

[10] The sponsorship application was refused in a letter dated November 2, 2007, on the basis that the applicant and his spouse were not considered "conjugal partners" under section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

[11] The applicant appealed that decision and two hearings took place. The purpose of the second hearing was to allow the applicant's spouse to testify by telephone from Brazzaville in the Congo. The applicant, Ms. Dihouassila and two witnesses made representations during the hearings.

[12] The panel denied the sponsorship application on April 15, 2009, and the applicant filed an application for leave and judicial review on June 10, 2009.

Impugned decision

[13] The decision does not address the issue of whether there is a good faith relationship within the meaning of section 4 of the Regulations. The only issue is whether the applicant and Ms. Dihouassila are conjugal partners as defined in section 2 of the Regulations, and the panel determined that the applicant and his spouse, who resides in the Congo, do not meet the conjugal partner test under the Regulations.

Relevant legislation

[14] The expression "conjugal partner" is defined in section 2 of the Regulations:

Interpretation **2.** The definitions in this section apply in these Regulations.	Définitions **2.** Les définitions qui suivent s'appliquent au présent règlement.
"conjugal partner" « partenaire conjugal » "conjugal partner" means, in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor	« partenaire conjugal » "conjugal partner" « partenaire conjugal » À l'égard du répondant, l'étranger résidant à l'extérieur du Canada qui entretient une relation conjugale avec lui depuis au

and has been in that relationship for a period of at least one year.	moins un an.

[15] According to section 4 of the Regulations, to be a member of the family class, the relationship between the conjugal partners must be genuine and must not have been entered into solely for the purpose of acquiring any status or privilege under the Act:

Bad faith	Mauvaise foi
For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.	**4.** Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait, le partenaire conjugal ou l'enfant adoptif d'une personne si le mariage, la relation des conjoints de fait ou des partenaires conjugaux ou l'adoption n'est pas authentique et vise principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi.

Standard of review

[16] Prior to the Supreme Court decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, patent unreasonableness was the standard of review applicable to a panel's decision concerning a sponsorship application based on findings of fact (*Leroux v. Canada (Minister of Citizenship and Immigration*), 2007 FC 403, 160 A.C.W.S. (3d) 527 at para. 16; *Canada (Minister of Citizenship and Immigration*) *v. Navarrete*, 2006 FC 691, 294 F.T.R. 242 at para. 17; *Sanichara v. Canada (Minister of Citizenship and Immigration*), 2005 FC 1015, 276 F.T.R. 190 at para. 11). Since *Dunsmuir*, the new standard of reasonableness applies.

[17] With respect to the second issue, questions involving procedural fairness in the context of immigration officers' decisions are reviewed on the standard of correctness, as determined in *Lak v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 350, 156 A.C.W.S. (3d) 904 (see also *Yahie* at paragraph 18).

1. Was it reasonable for the panel to decide that the applicant and Ms. Dihouassila were not conjugal partners?

Arguments of the parties

[18] The applicant maintains that the methods used by the panel to verify his knowledge and that of his spouse were difficult and ineffective and that the analysis was subjective rather than fact-based.

[19] The applicant claims that the panel did not carefully review the evidence he presented. In the applicant's view, the evidence provided i.e., the money transfer receipts, the photos, love letters and e-mails constitute genuine and official actions demonstrating a conjugal union that has existed for more than two years.

[20] The applicant also argues that the panel cannot omit the analysis under section 4 of the Regulations in assessing whether it is a good faith relationship, which the panel failed to do in this case.

[21] The applicant submits that the panel showed a lack of judgment by rigorously examining facts from almost eight years earlier and believes that there was never any ambiguity in their intentions or their romantic relationship. On this point, the applicant maintains that he provided relevant evidence about their relationship.

[22] The respondent submits that it was reasonable for the panel to find that the couple was not in a conjugal partner relationship because the couple did not demonstrate that they were conjugal partners as set out in their sponsorship application.

[23] Based on the contradictory evidence, the respondent maintains that it was reasonable for the panel to find that the applicant and his spouse contradicted each other when they described their intentions and that the desire to marry or not reflects different points of view on a crucial element of the panel's decision. Future goals do not establish a conjugal relationship, which must exist at the time the sponsorship application is filed (*Leroux* at para. 24).

Analysis

[24] An appeal before a panel is a hearing *de novo*. Accordingly, the applicant and his spouse had to provide sufficient reliable evidence showing that their conjugal relationship was genuine and that it was not entered into primarily for the purpose of acquiring a status under the Act (*Froment v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1002, 299 F.T.R. 70 at para. 19, citing *Sanichara* at para. 8; *Mohamed v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 696,

296 F.T.R. 73 at para. 40; *Morris v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 369, 147 A.C.W.S. (3d) 489 at para. 5).

[25] The consideration of conjugal partner status under section 2 of the Regulations is an integral part of interpreting section 4 of the Regulations. If it is not established on a balance of probabilities that a conjugal relationship exists, the relationship is not genuine, and it may be inferred that it was entered into primarily to obtain a status or privilege under the Act.

[26] The panel based its analysis on the non-exhaustive factors for identifying a conjugal relationship as established in *M. v. H.*, [1999] 2 S.C.R. 3, 238 N.R. 179. The weight to be assigned to the different factors varies, and a flexible method must be adopted in determining whether a conjugal union exists (*Cai v. Canada (Minister of Citizenship and Immigration*), 2007 FC 816, 159 A.C.W.S. (3d) 428 at para. 12).

[27] The criteria in *M. v. H.* were established for couples living in Canada and must be modified for couples living in different countries. However, as my colleague, Justice Tremblay-Lamer notes: "Nonetheless, the alleged conjugal relationship must have a sufficient number of features of a marriage to show that it is more than just a means of entering Canada as a member of the family class" (*Leroux* at para. 23).

[28] In this case, the panel applied some of the *M. v. H.* factors with flexibility in order to determine whether the applicant and Ms. Dihouassila were conjugal partners at the time of the

sponsorship application. *Inter alia*, the panel stated that it considered "the extent to which the parties cohabited or shared shelter; their sexual and personal behaviour toward each other; shared duties or services; social connection(s) and perceptions; economic support and livelihood; and the existence of children to the relationship".

[29] After analyzing the file and applying the factors in the *M.* v. *H.*decision, the panel made the following findings:

> *1. Cohabitation/sharing shelter*
> - The panel found that the applicant and his spouse cohabited for a brief period in Ghana in 2007 and that they did not cohabit during the period before the sponsorship application was filed.
>
> - In the panel's view, there was no evidence of any effort by the applicant or his spouse to see each other in the two years prior to the sponsorship application. The applicant noted that he could not afford to visit his spouse more than once, that his spouse was afraid to come to Canada and that his past political involvements prevented him from going to the Congo.
>
> *2. Engagement to marry*
> - The panel found that there were several contradictions in the testimony and written statements of the applicant and Ms. Dihouassila.
>
> - The panel was not able to tell whether the couple was engaged or whether they intended to marry.
>
> - The panel referred to the testimony of a close friend who believed that the couple was married but did not know whether a marriage had actually taken place.
>
> *3. Social perception*
> - The panel relied on the testimony of the applicant, his spouse and two of the couple's friends and concluded that the applicant and his spouse were romantically involved, but that does not support a finding of a conjugal relationship.

> *4. Financial and other support*
> - The panel analyzed the evidence showing that the applicant actively supported his spouse financially. The panel found that this support indicated a strong and committed relationship that could constitute a conjugal union, beyond promises to marry.
>
> - In terms of emotional support, the panel said that the visa officer found that Ms. Dihouassila knew very little about the applicant's life in Canada or, for example, the reasons why he had travelled to Ghana instead of the Congo to see her in 2007.
>
> *5. Existence of children and shared duties or services*
> - The panel noted that there are no children in this relationship and, apart from the funds provided to the spouse, there were no shared duties or services.

[30] Despite the fact that the panel determined that there was a romantic relationship between the parties, the evidence as a whole shows that it was not a conjugal relationship as defined in section 2 of the Regulations. The panel found that "[t]he contact between the two is too limited in several areas including; intimacy, cohabitation, life-sharing events and knowledge of each others hopes and dreams." Although there was evidence showing that the applicant supported Ms. Dihouassila financially, the evidence also revealed significant contradictions in the file. That is the case for the intentions of the applicant and his spouse to marry. For example, there are differences between the testimony of the applicant, Ms. Dihouassila and a witness, as well as the written sponsorship application and the notes from the Computer Assisted Immigration Processing System (CAIPS notes) of the visa officer who met Ms. Dihouassila. Indeed, the applicant testified that they were never engaged and did not intend to marry whereas during Ms. Dihouassila's interview, which took place in French in Kinshasa on May 23, 2007, she replied that both she and the applicant have been planning to marry since 1996 when he met her father and asked him for her hand in marriage. A

friend, Kwasi Tuafo, testified that they intended to marry and that that was the purpose of the trip to Ghana, but that also contradicts the applicant's testimony.

[31] In this case, the Court can only observe that the panel recognized the inconsistency and ambiguity of the testimony given by the applicant, his spouse and a witness regarding the status of the relationship between the applicant and his spouse and their future intentions. Most of the evidence consisted of e-mails and telephone calling cards, which clearly show constant communication between the applicant and his spouse. However, the Court notes, as the panel did, that if there is a romantic relationship, it is not sufficient, based on the record as a whole, to satisfy the test in section 2 of the Regulations.

[32] In the Court's view, the panel did not err and was correct in finding that the applicant did not provide sufficient evidence to establish that a conjugal relationship existed. The panel has expertise in determining what constitutes a "conjugal partner" and, in this case, the Court can find no basis upon which to intervene.

2. *Did the immigration officer err in law by not giving the applicant the opportunity to be heard in his own language?*

[33] At the hearing before this Court, the applicant advanced an argument regarding procedural fairness and natural justice. He submitted that the presiding member's accent made it hard for him to understand the questions. That could explain why some of the testimony seemed confused at times. Indeed, the transcript shows at some places that there were comments and discussions around

certain gaps in communication. These communication gaps sometimes occurred because of the English accent of the presiding member who was speaking French, sometimes because of the telephone signal of the applicant's spouse who was testifying by telephone from Brazzaville in the Congo. Nonetheless, the Court notes that the hearing took place in French and that the accent problem was resolved by bringing in an interpreter to rephrase and clarify questions as needed for the applicant and his spouse

[34] In support of this submission, the applicant stated at the hearing before this Court that the panel had used the expression [TRANSLATION] "social activities", which he had not understood before the panel. A review of the transcript shows the opposite: not only was the expression [TRANSLATION] "social activities" explained and understood at the hearing before the panel, but the applicant's spouse also gave examples on this point.

[35] For these reasons, the Court is of the view that the transcript in the record discloses that there was no breach of procedural fairness or natural justice.

[36] The application for judicial review is therefore dismissed. No question for certification has been raised and the record contains none.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question is certified.

"Richard Boivin"

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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