

Federal Court



Cour fédérale

Date: 20120412

Docket: IMM-4694-11

Citation: 2012 FC 415

Ottawa, Ontario, April 12, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

MOHAMED SALAHUDEEN KHAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board), dated June 15, 2011, which dismissed the applicant's appeal of the refusal of the application for permanent residence by his wife, Bibi Razela Khan (Razela), pursuant to section 63(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). For the reasons that follow, the application is dismissed.

Facts

[2] The applicant is a citizen of Guyana and a permanent resident of Canada, having been sponsored by his daughter. He has four children from a relationship with his former common-law spouse. The applicant states that he met Razela on June 15, 2004 in Guyana. They began telephoning each other and taking walks together. Their relationship became sexually intimate in February 2005. She moved to an apartment closer to him in August 2005 and they saw more of each other. After her apartment was broken into in September 2005, she moved into the applicant's father's home, where the applicant also lived. However, while sexually intimate, their relationship was not exclusive and, in the applicant's testimony before the Board, Razela was best characterized as a roommate, not as a live-in partner. Both had other partners

[3] The applicant arrived in Canada on June 16, 2006. Prior to his arrival he helped Razela find a new apartment and secured it with three months' deposit. She asked an Imam to bless the apartment, which he said he would only do if the couple committed to each other and asked forgiveness for her sinful lifestyle through a Nikkah (religious marriage) ceremony. Thus, 12 days prior to his departure from Canada they participated in the ceremony, but never legally registered the marriage or considered themselves married at that time.

[4] The applicant stated he was lonely when he came to Canada and missed Razela. His children in Guyana told him that she was going out with other men which made him jealous. He then asked three other women from previous relationships if they would marry him and join him in Canada. Two refused, but Lilowtie Mohabir accepted and the two were married in December 2006.

However, their relationship broke down after less than a month and the applicant states he still had feelings for Razela.

[5] In February 2007, the applicant confronted Razela about the rumours she had seen other men and she assured him it was not true. The two became friendly again and he began to see her as a potential wife. They stayed in contact when he went back to Canada and in May 2007 he asked her to marry him. They were married on October 15, 2007.

[6] The applicant applied to sponsor Razela and that application was refused in February 2009. The applicant appealed and the appeal was heard on October 8, 2010 and June 3, 2011. Razela was not called as a witness although the transcript of a brief interview at the High Commission was before the Board.

Decision Under Review

[7] The Board found that the applicant was not credible as he gave inconsistent, incoherent and confusing testimony. The Board found that he embellished and adjusted his testimony to try and make sense of his actions.

[8] In its decision the Board focused a great deal on the inconsistent way that the applicant described the nature of his relationship with Razela; he stated they were just friends who slept together, which the Board found inconsistent with the fact that the Nikkah ceremony was performed. The Board did not accept the applicant's explanation of the ceremony that it was to appease Razela's Imam.

[9] The Board also found it confusing for the applicant to claim that he married another woman because the relationship with Razela had broken down when by his account they did not have a committed relationship at the time. The Board took further issue with the applicant giving Razela power of attorney in February 2007, so soon after they had allegedly reconciled. The Board also noted that the applicant and Razela referred to each other as husband and wife in correspondence before they were legally married. The Board rejected the explanation that this was just “in fun”, and made a negative credibility finding.

[10] The Board acknowledged evidence of the applicant’s travel to Guyana, telephone bills and evidence of joint assets and money transfers. However, the Board found that the contradictions and discrepancies outweighed this evidence and concluded that the applicant had failed to establish that the marriage was genuine and was not entered into primarily for the purposes of acquiring status under the *IRPA*. The appeal was therefore dismissed.

Issue

[11] The only issue raised by this application is whether the Board’s decision was reasonable.

Analysis

[12] Notwithstanding some errors in the Board’s reasoning, and despite the very able argument on the part of counsel for the applicant, I find that the decision as a whole is reasonable and therefore the application must be dismissed.

[13] The Board erred in its consideration of some of the evidence. For example, the Board relied on portions of the correspondence between the applicant and Razela to conclude that the marriage was not genuine because the couple referred to each other as “husband” and “wife” before they were legally married. The Board stated at paragraph 18 of its decision:

Confronted with this inconsistency, the [applicant] stated that they referred to each other this way « for the sake of fun ». Although the [applicant] maintained that they were just friends before he came to Canada, he did not explain in a coherent and satisfactory manner why then, they were referring to each other as husband and wife in the letters they wrote to each other before their alleged marriage on October 15, 2007. The discrepancies in the evidence affect the [applicant’s] credibility...

[14] The applicant stated that he and Razela were “just friends” the year before the correspondence in which they refer to each other as “husband” and “wife”. Thus, the Board has misconstrued the timeline and in consequence found an inconsistency when none existed. Also, the Board referred to the couple’s “alleged marriage”, but never marked a clear finding that the couple did not marry on October 15, 2007.

[15] However, while the Board committed some errors in its reasoning, I cannot find that these errors render the decision unreasonable. In other words, even if any, or all, of those errors had not been made, I cannot find that the outcome would have been different; principally because the Board found that the applicant’s testimony was not credible.

[16] The Board found that the applicant was neither truthful nor straightforward and that he adjusted his testimony to try and make sense of his actions. Since the Board member had the advantage of hearing the testimony and observing the applicant’s demeanor, the Court must be

deferential regarding her credibility findings, so long as they were reasonably open to her. Given the unusual narrative presented by the applicant and the Board's finding that he was inconsistent and incoherent in his testimony, it was reasonably open to the Board to reject the applicant's evidence and conclude that he had not proven the marriage to be genuine. The Court therefore, has no basis to intervene and the application must be dismissed.

[17] Finally, as the Court noted at the conclusion of the hearing, the adversarial system requires active participation from both parties. It is not sufficient to point to the standard of review and hope that deference will win the day. The Court depends, in both oral and written argument, on the engagement of both parties to ensure that the adversarial process functions as intended.

[18] The application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4694-11

STYLE OF CAUSE: MOHAMED SALAHUDEEN KHAN v. THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto

DATE OF HEARING: January 25, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** RENNIE J.

DATED: April 12, 2012

APPEARANCES:

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