

Federal Court



Cour fédérale

**Date: 20121129**

**Docket: IMM-9657-11**

**Citation: 2012 FC 1404**

[UNREVISED ENGLISH CERTIFIED TRANSLATION]  
Ottawa, Ontario, November 29, 2012

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

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Applicant**

**and**

**ALAIN MOREL**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] The Minister of Citizenship and Immigration (the Minister) is seeking to have set aside a sponsorship decision rendered on November 15, 2011, by a member of the Immigration Appeal Division (the panel), who allowed the appeal of Alain Morel from the refusal of the application for permanent residence in the family class (the application) made by his conjugal partner, Rui

Guo (the applicant), a citizen of the People's Republic of China, following an interview with Mr. Guo on September 21, 2009, by visa officer D. Doherty at the Canadian Embassy in Beijing.

[2] The visa officer refused the application sponsored by Mr. Morel for two reasons: (1) she was not satisfied that a conjugal relationship existed between the two men because they were not in marriage-like relationship (marriage-like relationship with your sponsor) within the meaning of section 2 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) (the Regulations); and (2) their relationship was entered into primarily for the purpose of acquiring any status or privilege under the Act under the paragraph 4(1)(a) of the Regulations.

## II. Facts

[3] Mr. Morel and Mr. Guo met on the Web site "asiafriendfinder" in February 2007. Mr. Morel had posted his profile on this Web site sometime in late 2006 or early 2007. The two men continue to be in touch daily. Mr. Morel travelled to China to meet Mr. Guo on September 13, 2007, and returned to Canada on September 22, 2007. During his trip to China, they lived together at the hotel where Mr. Morel was staying.

[4] Mr. Morel returned to China to visit Mr. Guo in September 2008, January 2010 and September 2010.

[5] Mr. Guo applied for residence in May 2009.

[6] Mr. Morel is currently 59 years of age and was married once between 1977 and 1982. He is the father of several children. Mr. Guo, born on September 18, 1986, was 21 when he met Mr. Morel for the first time. He is now 27 and has never been married.

[7] Mr. Morel and Mr. Guo both testified at the hearing before the panel.

### III. Regulatory provisions

[8] “Conjugal partner” is defined as follows in section 2 of the Regulations:

“conjugal partner” means, in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year.

[Emphasis added]

“partenaire conjugal” À l’égard du répondant, l’étranger résidant à l’extérieur du Canada qui entretient une relation conjugale avec lui depuis au moins un an.

[9] Subsection 4(1) of the Regulations (current version) reads as follows:

4. (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership

(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or

(b) is not genuine.

[Emphasis added]

4. (1) Pour l’application du présent règlement, l’étranger n’est pas considéré comme étant l’époux, le conjoint de fait ou le partenaire conjugal d’une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :

a) visait principalement l’acquisition d’un statut ou d’un privilège sous le régime de la Loi;

b) n’est pas authentique.

#### IV. The impugned decision

[10] The panel considered two issues, namely (1) whether Mr. Morel and Mr. Guo fit the definition of “conjugal partner” within the meaning of the Act and the Regulations; and (2) whether this relationship is genuine and was not entered into primarily for the purpose of acquiring any status or privilege under the Act, in accordance with section 4 of the Regulations.

##### (1) Conjugal partner

[11] While the Act and the Regulations do not define “conjugal relationship”, the term “conjugal” has been defined and interpreted in the case law as a “marriage-like relationship”.

The panel noted that, in *M. v. H.*, [1999] 2 SCR 3, the Supreme Court of Canada adopted the generally accepted characteristics of a conjugal relationship, namely,

- Shared shelter: whether the partners live together in the same home as a couple;
- Sexual and personal behaviour: whether the partners’ relationship is exclusive, committed, and evidenced by emotional, intellectual, and physical interaction;
- Services: whether household and other family-type responsibilities are shared, and whether there is evidence of mutual assistance, especially in time of need;
- Social activities: whether the partners share time together or participate in leisure activities together, and whether they have relationships or interaction with each other’s respective families;
- Economic support: whether the partners are financially interdependent or dependent, and whether they have, to some extent, joined their financial affairs or arranged them to reflect their ongoing relationship;
- Children: the partners’ attitude and conduct towards children;
- Societal perception of the couple: whether the partners are treated or perceived by the community as a couple;

[12] The panel found as follows:

In applying the above-mentioned criteria, the case law does not rely on only one or a few specific factors to determine the existence of a conjugal relationship. The goal is to determine whether the relationship is conjugal, and the criteria must be applied only insofar as they may assist in this determination.

The panel is of the opinion that these criteria can be used to determine whether a conjugal relationship exists, while also taking into account the specific circumstances of immigration. These criteria or factors are not strict or exhaustive, and the weight assigned to each factor can vary according to the circumstances of each case. What is important is to determine whether the evidence demonstrates that a conjugal relationship exists between the appellant and the applicant.  
[Emphasis added.]

[13] However, it should be noted that, when evaluating those criteria, the panel must also consider the effect of social customs and practices, as well as the individual ways in which the partners express the conjugal relationship, and the cultural context. The issue is whether, basically, there is a relationship between the appellant and the applicant that resembles a marriage between partners.

[14] The panel added that it was particularly aware of the social, cultural and legal difficulties that the appellant and the applicant face. The appellant and the applicant are in a homosexual relationship. The applicant is of Chinese origin and lives in Chengdu City, in the province of Sichuan, China. The appellant testified that homosexuality is considered to be a crime in China.

[15] Throughout its analysis, the panel considered this socio-cultural reality and recognized that there can be various models of conjugal relationships, depending on the circumstances of each case.

[16] The panel stated that it had reviewed the evidence for the year preceding the filing of the permanent residence application on May 29, 2009, since the definition of conjugal partner requires that the conjugal relationship must have existed for a period of at least one year.

[17] The panel stated that it took the time to carefully read all of the conversations between the appellant and the applicant, especially those that preceded May 29, 2008, in order to determine whether this evidence does indeed demonstrate a marriage-like relationship since May 29, 2008. The panel noted that the documentary evidence concerning their contact was extensive.

[18] The panel was of the opinion that the quantity of conversations was insufficient to demonstrate a marriage-like relationship; however, the content of the conversations demonstrates a couples' relationship with its highs and lows. They talk to each other about their days, their feelings, their moods and their schedules, they question each other about their relationship, they squabble, and so on. They both worry when they cannot reach the other person. The panel was of the opinion that the spouses have shared a life together through a computer since 2007.

[19] Mr. Morel testified that they had been in a romantic relationship since the summer of 2007 and that their relationship became official during his first trip to China, from September 13 to 22, 2007, during which time they lived together. They consummated their relationship during this trip.

[20] He also testified that, during this first trip, he met Mr. Guo's half-sister and his friends. He met Mr. Guo's mother during his second trip to China in September 2008, after Mr. Guo had told his parents that he was gay.

[21] The panel noted that Mr. Morel first sent money to Mr. Guo in October 2007, and that he explained that Mr. Guo works in China as a photographer and that, although he is not rich, he is able to meet his needs.

[22] The panel was satisfied that the documentary evidence demonstrated that the people close to Mr. Morel were aware of the relationship and considered it to be serious.

[23] The panel expressed its finding on this first issue in the following manner:

The panel notes that it is understandable, in the circumstances, that the appellant and the applicant have been unable to demonstrate publicly and to the applicant's parents that they are conjugal partners. When the applicant's mother learned that her son is gay, she did not accept it right away. In addition, this subject is still taboo in China, and it was impossible for them to express their sexual orientation in public. The panel is satisfied that there is a solid attachment between the appellant and the applicant and that they are in an exclusive marriage-like relationship.

Consequently, the panel considered all of the evidence and is satisfied, on a balance of probabilities, that the relationship between the appellant and the applicant constitutes a conjugal relationship within the meaning of the definition of "conjugal partner" set out in section 2 of the Regulations and in the applicable case law that was cited.

[Emphasis added.]

(2) Genuine relationship

[24] Regarding this issue, the panel found that Mr. Morel had demonstrated, on a balance of probabilities, that his relationship with the applicant was genuine and that it was not entered into primarily for the purpose of acquiring any status or privilege under the Act. The panel based this finding on the following factors:

- They are in touch constantly, on a daily basis, often several times a day;
- Their testimony was spontaneous and direct, and there is extensive documentary evidence supporting the good faith of this relationship.
- The evidence demonstrates that their relationship has been exclusive since September 2007, and their friends and families know about the relationship.
- Mr. Morel has travelled to China four times to visit Mr. Guo. During these trips, they always lived together and spent all of their time together. They visited Mr. Guo's family and did activities with his family and his friends.
- Even though Mr. Guo works, Mr. Morel sometimes sends him money, and has been doing so since 2007.
- In August 2009, Mr. Morel named Mr. Guo as his beneficiary in his will.

V. Arguments

(a) Minister's position

[25] The Minister makes the following submissions:

- (1) Even though Mr. Morel's appeal was an appeal *de novo* in the course of which the panel reexamined whether the applicant and his sponsor met the criteria of sections 2 and 4 of the Regulations, the panel could not confine itself to



considering the new evidence and ignore the evidence presented before the visa officer. The panel had to examine Mr. Guo's testimony and the visa officer's decision. He refers to *Tran v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1257.

- (2) The panel misinterpreted and misapplied the concept of “conjugal partner” in several respects. The Minister sets out the applicable principles, as follows:
1. The expressions “conjugal partner” and “partenaire conjugal” are defined in section 2 of the Regulations.
  2. In the present matter, the panel had to determine whether, at least on May 29, 2008, the applicant (Mr. Guo) and the respondent (Mr. Morel) met the definition of conjugal partner in light of the evidence preceding that date.
  3. To clarify the debate on the concept of “conjugal partner”, an analysis of the applicable case law and policies is required (Section 5 of Citizenship and Immigration Canada OP 2 Manual).
  4. The test established in *M v H*, for couples living in Canada, was used to determine whether the relationship was a conjugal one, relying on the decision of Justice Boivin in *Mbollo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1267 [*Mbollo*], from which I quote paragraph 27:  
  
[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).

[Emphasis added.]

5. The panel adopted some of the factors from *M v H* in its analysis.

[26] The Minister submits that the reasons set out by the panel to support its findings are not consistent with the features of a conjugal relationship as described by the Supreme Court in *M v H*, which the IAD took pains to list in its reasons and which allegedly guided its decision. These reasons are also not consistent with the factors or criteria referred to in the OP 2 Manual. The panel therefore erred in law. According to the Minister, the panel found that Mr. Morel and Mr. Guo met the definition of “conjugal partners” by relying on the following factors:

1. The spouses have shared a life together through a computer since 2007.
2. Their relationship has been exclusive since 2007. Mr. Guo’s sister and his friends are aware of the relationship. They lived together at the hotel during Mr. Morel’s first trip to China.
3. Money was transferred as early as August 2007.

[27] According to the Minister, the panel erred in using the term “spouses” since they are not married, and it was unreasonable to find that they have shared a life together through a computer since 2007.

[28] According to the case law, 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 (*Mbollo* above).

1. It was unreasonable for the panel to conclude that Mr. Morel and Mr. Guo were in a marriage-like relationship considering that, until May 29, 2008, they had been together for 10 days in September 2007.
2. According to the case law (*Mbollo* above at para 21), e-mails and telephone calling cards are not sufficient to establish a conjugal relationship under section 2 of the Regulations, even if they show constant communication or even a romantic relationship. The Minister also referred to *Canada (Minister of Citizenship and Immigration) v Savard*, 2006 FC 109, and the OP 2 Manual.

[29] The Minister submits that the panel erred in applying the “economic support” factor, the purpose of which is to see whether the partners are financially interdependent or dependent, and whether they have, to some extent, joined their financial affairs. According to the Minister, the panel [TRANSLATION] “seems to conclude that the receipt for a transfer of money (\$100) on October 26, 2007, satisfies this test”.

[30] The Minister submits that the panel erred in fact and in law when it determined that the conjugal relationship between the two men was genuine and was not entered into primarily for the purpose of acquiring any status or privilege. The panel erred in applying the former version of section 4 of the Regulations. In fact, according to the Minister, under the current version, if one of the two factors (genuineness of the marriage and parties’ intentions) is not met, the exclusion contained in the new subsection 4(1) of the Regulations applies.

[31] The Minister submits moreover that the panel erred in its interpretation and enforcement of section 4 of the Regulations by primarily assessing Mr. Morel's intention. It failed to examine Mr. Guo's intention.

(b) Mr. Morel's position

[32] Counsel for Mr. Morel submits the following:

1. The standard of review for questions of credibility and the genuineness of a common-law partnership is reasonableness. Consequently, this Court must determine whether the panel's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
2. The panel attests that it "assess[ed] the testimony and analyz[ed] all of the documentary evidence on file", which includes the facts before the visa officer at the Embassy in her initial decision. This is the panel's prerogative in an appeal *de novo*. According to counsel for Mr. Morel, the Minister attempted to obtain a redetermination of the weighing of the various factors taken into consideration by the panel, which is not permitted on judicial review.
3. The panel did not err in fact and in law in its interpretation and application of the concept of "conjugal partner". Counsel points to paragraph 21 of the memorandum of the Minister, in which he alleges that

[TRANSLATION]

[21] . . . the reasons set out by the IAD [Immigration Appeal Division] to support its finding are not consistent with the features of a conjugal relationship as described by the Supreme Court in *M v. H.*, which the IAD took pains to list in its reasons and which allegedly guided its decision. These reasons are also not consistent

with the factors or criteria referred to in the OP 2 Manual. The IAD therefore erred in law.

Counsel contends that, even if it were shown that the panel's reasons are not consistent with the OP2 Manual criteria, this is not an error of law since immigration manuals and ministerial instructions are not legal provisions, and that, moreover, the Minister fails to demonstrate how the panel failed to respect the criteria set out in the OP 2 Manual. According to counsel for Mr. Morel:

[TRANSLATION]

To the contrary, the IAD's analysis reveals attention to these similar but more detailed criteria than those set out in the Manual, specifically, whether there is interdependence or a barrier to cohabitation. The OP-2 Manual (see page 20 of the Manual) is largely based on *M. v. H.* of the Supreme Court, and was adopted by the IAD in the matter at bar. Furthermore, it is important to point out that, according to the OP-2 Manual (page 35 of the Manual), the volume, regularity and style of the communication between partners should be considered . . . .

4. Regarding the alleged misinterpretation and misapplication of the criteria set out in *M. v H.*, counsel for Mr. Morel writes as follows:

[TRANSLATION]

The respondent submits that the IAD did not err in fact and in law in its interpretation and application of the criteria established in *M. v. H.* by the Supreme Court and that, through this argument, the applicant is attempting to obtain a redetermination of the weighing of the various factors taken into consideration by the IAD in its assessment at the cost of a selective assessment of the factors in question and a questionable analysis of the case law.

He quotes paragraph 21 from Justice Tremblay-Lamer's decision in *Leroux v Canada (Minister of Citizenship and Immigration)*,

2007 FC 403, according to which the Supreme Court recognized that

. . . the weight to be attached to the various factors may vary infinitely and hold true for same-sex couples. Accordingly, courts must use a flexible approach to determine whether a conjugal relationship exists, since relationships of couples vary (*M. v. H.*, [[1999] 2 SCR 3], at paragraph 60).

He also quotes from paragraph 23 of Justice Tremblay-Lamer's decision in *Leroux v Canada (Minister of Citizenship and Immigration)*, 2007 FC 403:

3 Although this Court has not rendered any decision about the criteria to be used in an immigration context to determine whether there is a conjugal relationship, several IAD decisions have recognized that the criteria in *M. v. H.* were established for couples living in Canada and must be modified for couples living in different countries (see: *McCullough v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 25, *Schatens v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 330, *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 3; *Porteous v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 560). I agree. It seems to me to be important to keep in mind the restrictions which apply because the partners live in different countries, some of which have different moral standards and customs which may have an impact on the degree of tolerance for conjugal relationships, especially where same-sex partners [sic] are concerned. Nevertheless, 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.

He concludes that the interpretation given by the panel to the concept of conjugal partner in paragraphs 7 to 15 of its decision [TRANSLATION] "squares" perfectly with these case law requirements, writing as follows:

[TRANSLATION]

The IAD clearly states that the criteria in *M. v. H.* can be used to determine whether a conjugal relationship exists, while also taking into account the specific circumstances of immigration. These criteria or factors are not strict or exhaustive, and the weight assigned to each factor can vary according to the circumstances of each case (para. 10 of the panel's decision). In that regard, the IAD considered the social, cultural and legal difficulties faced by the respondent and the applicant because of their homosexual relationship and the perception of such relationships in the applicant's country of origin (para. 12).

5. Counsel notes that, in his memorandum, the Minister provides only an exhaustive list of the factors that led the panel to conclude that Mr. Morel and Mr. Guo meet the definition of "conjugal partners". This is because the Minister considers only the factors prior to May 29, 2008. He acknowledges that the panel took pains to specifically exclude the evidence existing on May 29, 2008, [TRANSLATION] "but that it interpreted it in the broader context of the assessment of all" of the evidence. He quotes *Leroux*, at paragraph 26, namely, that section 2 of the Regulations requires that the relationship must have existed "for a period of at least one year" as of the date of filing of the sponsorship application but that neither the Act nor the Regulations restricts the examination exclusively to this period.
6. He submits that the assessment of the various pieces of evidence that led the panel to conclude that Mr. Morel and Mr. Guo are conjugal partners is not at all unreasonable.

- (1) Use of the term “spouse” is an isolated clerical error that is of no importance since the panel knew that the two men were not married.
- (2) The panel’s finding that Mr. Morel and Mr. Guo have shared a life together through a computer is not unreasonable because it relies on an incomplete assessment of the case law it relies on and a selective consideration of the arguments made by the IAD, which does not situate this assessment in the overall review of the evidence as a whole.
- (3) While it is true that, in the decision referred to by the Minister, the Court found that email and telephone exchanges were insufficient to establish a conjugal relationship, this was, according to counsel, [TRANSLATION] “because of other pieces of evidence that conflicted with a finding of a conjugal relationship and that could at best establish a romantic relationship”. He refers to *Leroux*, which supports the filing of such evidence to demonstrate the genuineness of a relationship. Moreover, in the present case, the evidence as a whole shows that the panel did not only rely on the evidence of Internet and telephone exchanges to establish the conjugal relationship between the parties.



[33] Counsel for Mr. Morel rejects the applicant's argument that the panel erred in law in rendering a decision based on the former version of section 4 of the Regulations. He notes that the new version of the Regulations took effect on September 30, 2010, and therefore came into force between the initial decision of the officer at the Embassy and the decision made by the panel in November 2011. According to counsel [TRANSLATION] "in so far as the new version of section 4 is more onerous, fairness requires the enforcement of the law in effect at the time of the initial decision". He cites Justice Mosley's decision in *Asma Elahi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 858 at paragraph 12.

## VI. Analysis and Conclusion

### (a) Standard of review

[34] The standard of review is reasonableness, since the panel considered the issue before it on the basis of an analysis of the evidence, which is a question of fact. In *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, at paragraph 47, the Supreme Court of Canada explained the nature of a reasonable decision:

47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision

falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

(b) Findings

[35] I believe that the Court's intervention is warranted for the following reasons:

- (1) The panel had the duty to determine whether, on May 29, 2009, the relationship between Mr. Morel and Mr. Guo was a conjugal one. The evidence before the panel consisted of emails and telephone exchanges since 2007, a money transfer in October 2007 and a 10-day period of cohabitation. According to the case law, that is insufficient to create a marriage-like conjugal relationship. It was unreasonable on the part of the panel to conclude that such a relationship had existed for a year.
- (2) The panel erred in fact and in law in finding that Mr. Morel and Mr. Guo have shared a life together through a computer.
- (3) The panel erred in its analysis that the relationship between Mr. Morel and Mr. Guo was not entered into primarily for the purpose of acquiring the status of permanent resident. Almost the entire decision deals with Mr. Morel's intentions. The panel should have considered both parties' intentions.
- (4) The panel should not have ignored the evidence before the officer, namely  
[TRANSLATION]
  - “The applicant stated that he did not have the means to come to Canada as a student or the type of qualifications required to obtain a work permit.
  - The applicant stated as early as the first emails, when they were describing themselves, that he loved the respondent. According to the evidence

provided during the interview with the visa officer, the applicant was not looking for a lover of foreign origin on the asiafinder.com Web site but simply a friend.

- The incompatibility between the respondent and the applicant who has always had girlfriends and is in his first homosexual relationship.
- The applicant's lack of knowledge about the respondent's life.”

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES that** the application for judicial review is allowed; the panel's decision is set aside and the respondent's appeal is to be redetermined by a differently constituted panel. No question was proposed for certification.

“François Lemieux”

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Judge

Certified true translation  
Johanna Kratz, Translator

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

**DOCKET:** IMM-9657-11

**STYLE OF CAUSE:** THE MINISTER OF CITIZENSHIP AND  
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**REASONS FOR JUDGMENT  
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**DATED:** November 29, 2012

**APPEARANCES:**

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