Date: 20090430

Docket: IMM-1940-08

Citation: 2009 FC 435

Ottawa, Ontario, April 30, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SANDI STRULOVITS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] [9] The applicant essentially argues that the Majority did not properly assess the totality of the evidence and failed to analyse in its decision relevant evidence or to consider the various explanations given by the sponsoree in his testimony. In particular, she alleges that the Majority did not comment on the telephone bills, photos, letters, affidavits (from the matchmaker, the sponsoree's mother and one of the applicant's daughters), and money transfers tendered in support of the applicant's appeal. Therefore, this demonstrates that the Majority ignored relevant evidence in coming to its decision.

[10] The arguments made by the applicant against the decision rendered by the Majority are all unfounded, in my view, and do not resist a comprehensive reading of their reasons. Indeed, the IAD was allowed to consider, and considered in its decision, the length of the parties' prior relationship before their arranged marriage, their age difference, their former marital or civil status, their respective financial situation and employment, their family background, their knowledge of one

> another's histories (including the applicant's daughters' ages and general situation), their language, their respective interests, the fact that the sponsoree's mother, two of his brothers, as well as aunts and cousins were living in British Columbia, and the fact that the sponsoree had tried to come to Canada before. In view of these relevant and determinative factors, the mere fact that not all the evidence presented by the applicant was referred to in the decision rendered by the Majority does not permit me to conclude in this case that the latter has failed, as alleged by the applicant, to take that evidence into account in reaching its conclusions.
>
> [11] No suggestion or serious argument has been made by the applicant that the IAD breached a principle of natural justice or failed to apply the correct legal test in assessing whether the exclusionary provisions of section 4 of the Regulations applied in this case. The applicant is essentially asking the Court to reweigh the evidence that was before the IAD. The Majority had very strong reservations with respect to the genuineness of the marriage in view of the lack of compatibility between the spouses. The Majority also questioned the intent of the sponsoree to reside permanently with the applicant and found the sponsoree's primary interest to enter Canada was to join his nuclear family. The Majority's concerns are well articulated and clearly supported by the evidence on record. Overall, I find that the majority's reasoning is not capricious or arbitrary and supports their ultimate conclusion. Although I may have come to a different conclusion, as did the Minority number in this case, it was not patently unreasonable for the majority of the IAD to come to this conclusion based on the evidence before it. (Emphasis added).

(The decision of the Board is consistent with the legal principles of this Court as explained recently by Justice Luc Martineau, in *Khera v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 632).

II. Judicial Procedure

[2] This is an application for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board (Board), dated April 7, 2008, dismissing the appeal filed by the Applicant, pursuant to subsection 63(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), against the refusal by a Visa Officer of the Sponsored application for permanent residence of Mr. Mohammed Bouamoud.

[3] The Applicant has not shown that the Board's decision in this case, which is a simple assessment of the facts and of the credibility of Mr. Bouamoud, warrants the intervention of this Court.

III. Background

[4] The Applicant, Ms. Sandi Strulovits, is a 56 year old divorcee with no children. She is a teacher with an annual income of $64,000 per year.

[5] Mr. Mohammed Bouamoud is a 47 year old Morocco national. He describes his occupation as "comptable pointeur". He works part-time and he is a francophone.

[6] Mr. Bouamoud, who had applied for a visitor's visa in 1990, first entered Canada and stayed in Canada without status for a period of two years. He was arrested for various offences (shoplifting, evasion, etc.) and was deported in February 1992.

[7] In June 1992, Mr. Bouamoud returned illegally to Canada through Blackpoll, was convicted of various offences and was deported in September 1992.

[8] In April 1994, Mr. Bouamoud returned illegally to Canada, was convicted of various offences and was deported in August 1994.

[9] In November 1994, Mr. Bouamoud returned illegally, was convicted of a criminal offence and deported in February 1995.

[10] Nevertheless, in 1995, Mr. Bouamoud returned illegally to Canada and was deported again.

[11] In 1997, Mr. Bouamoud, once again, returned illegally to Canada and he allegedly met Ms. Strulovits in a discothèque in November 1997 and allegedly cohabited with her from the day they met until May 1998. Ms. Strulovits testified that she started cohabitation with Mr. Bouamoud after a brief courtship. He was deported again in August 1998.

[12] Ms. Strulovits testified that it was a police officer who arrested Mr. Bouamoud who suggested that if the couple got married, she could sponsor him and he could apply for permanent residence.

[13] From 1998 to 2003, Ms. Strulovits allegedly kept contact with Mr. Bouamoud by telephone; however, Mr. Bouamoud first testified that Ms. Strulovits had gone to Morocco every year in that period before changing his testimony.

[14] From 2003 to 2005, Ms. Srulovits went to Morocco five times.

[15] On January 25, 2005, Mr. Bouamoud was granted a pardon pursuant to the *Criminal Records Act*, R.S., 1985, c. C-47, for the offences he committed in Canada.

[16] In March 2005, Mr. Bouamoud was convicted in Morocco of drunkenness and theft and is therefore inadmissible in Canada pursuant to paragraph 36(2)(*b*) of the IRPA.

[17] On August 10, 2005, during a trip in Morocco, Ms. Strulovits married Mr. Bouamoud. In the *Acte de marriage* she is described as a Christian.

[18] In December 2005, Mr. Bouamoud applied for residence in Canada as a member of the family class and Ms. Strulovits sponsored him.

[19] On May 29, 2006, a Visa Officer interviewed Mr. Bouamoud to assess whether the marriage was *bona fide*.

[20] During the interview, Mr. Bouamoud described Ms. Strulovits as a non practicing Catholic and stated that he had met her family while he was in Canada. He did not show evidence that he was writing to Ms. Strulovits or giving her gifts.

[21] On September 15, 2006, the Visa Officer came to the conclusion that Mr. Bouamoud entered into his marriage to Ms. Strulovits primarily for the purpose of acquiring the permanent residence in Canada and denied the visa application.

[22] On September 15, 2006, the Visa Officer also denied the application on the ground that Mr. Bouamoud was criminally inadmissible based on his Moroccan conviction.

[23] On December 1, 2006, Ms. Strulovits appealed the decision made by the Visa Officer to the Board, pursuant to subsection 63(1) of the IRPA.

[24] On March 9, 2007, the Board wrote to Ms. Strulovits to indicate that it could not consider humanitarian and compassionate (H&C) considerations.

[25] On June 18, 2007, the hearing scheduled for August 10, 2007 was postponed at the request of Ms. Strulovits.

[26] On January 29, 2008, the Respondent requested, by motion, that another reason for refusal be added, that because Mr. Bouamoud has been deported several times from Canada, he is not entitled to return unless authorized pursuant to section 52 of the IRPA. The Motion was granted on February 5, 2008.

[27] On February 13, 2008, Ms. Strulovits filed five exhibits.

[28] The Appeal was heard by the Board on February 27, 2008.

[29] Ms. Strulovits submitted that her marriage was genuine and that there are sufficient H&C reasons that warrant special relief in light of all the circumstances of the case.

[30] The Board heard the testimony of Ms. Strulovits and of Mr. Bouamoud.

[31] Ms. Strulovits testified that, for various reasons, she was not interested in moving to Morocco.

[32] The only evidence on file that Ms. Strulovits was in touch with Mr. Bouamoud, apart from the trips to Morocco, are telephone bills of June 2006, October 2006, November 2006 and August 2007.

Impugned decision

[33] The Board found that Ms. Strulovits "had not demonstrated, on a balance of probabilities, that the relationship is not one described in section 4 of the IRPR" (*Immigration and Refugee Protection Regulations*, SOR/2002-227), or in other words, that the relationship is genuine and that it was not entered into for the primary purpose of acquiring a status or a privilege under the IRPA. It based its decision on the following findings of facts:

a) The couple was unable to demonstrate a *bona fide* intention of marriage by Mr. Bouamoud due to compelling evidence, including his testimony, which revealed that he had lived and worked illegally in Canada and had been deported repeatedly;
b) During their alleged cohabitation in 1997/98, Mr. Bouamoud did not tell Ms. Strulovits that he was in Canada illegally;
c) In 1997/98, Ms. Strulovits was not told that Mr. Bouamoud had previously been deported from Canada and that he had a criminal record;

d) There were no friends, no neighbours and hardly any relatives, except Mr. Bouamoud's parents, one sister and an adopted child, who attended the wedding ceremony, recognizing that this was at the age of 43, Mr. Bouamoud's first marriage;

e) No wedding reception, not even a modest one was held;

f) It was implausible that the *Acte de marriage*, would describe Ms. Strulovits as a Christian;

g) During his interview with the Visa Officer, Mr. Bouamoud described Ms. Strulovits as a Catholic and the Board did not believe Mr. Bouamoud when he denied having told that to the Visa Officer;

h) The differences in age and religion, were relied upon;

i) Mr. Bouamoud testified that he wanted children and it was implausible, further to evidence on record, that Ms. Strulovits could have children at her age.

IV. Issues

[34] (1) Did the Board base its decision on an erroneous conclusion of fact without regard to the evidence before it?

(2) Although Ms. Strulovits relied on the case, *Khan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1372, 143 A.C.S.W. (3d) 736, should the Board be faulted for having considered the age difference?

V. Analysis

Legislative Provisions

[35] Subsection 12(1) of the IRPA reads as follows:

Selection of Permanent Residents	*Sélection des résidents permanents*
Family reunification	Regroupement familial
12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	**12.** (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.

(Emphasis added).

[36] Section 4 of the IRPR reads as follows :

Bad faith	Mauvaise foi
4. 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. (Emphasis added).	**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.

[37] Section 63(1) of the IRPA reads as follows:

Right to appeal — visa refusal of family class	Droit d'appel : visa
63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.	**63.** (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

[38] Section 65(1) of the IRPA reads as follows:

Humanitarian and compassionate considerations	Motifs d'ordre humanitaires
65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.	**65.** Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire.

[39] Subsection 67(1) of the IRPA reads as follows:

Appeal allowed	Fondement de l'appel
67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67.** (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
(*a*) the decision appealed is	*a*) la décision attaquée est

wrong in law or fact or mixed law and fact;	erronée en droit, en fait ou en droit et en fait;
(*b*) a principle of natural justice has not been observed; or	*b*) il y a eu manquement à un principe de justice naturelle;
(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	*c*) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

Standard of Review

[40] As stated in a recent decision, the standard of review when dealing with the assessment of facts is the standard of « reasonableness » :

> V. Standard of Review
>
> [15] The first two issues concern ultimately a question of fact as to whether the applicant's marriage is a genuine one. This is a "jurisdictional fact", which is subject to the same standard of review as other questions of fact. By finding the marriage was entered into primarily to gain admission to Canada, the IAD excluded the applicant's wife (the Sponsor) from the family class. In essence therefore, the two issues are factual and involve the IAD's appreciation of the applicant's evidence. And given the fact that the IAD had access to oral evidence, its decision is subject to a high degree of judicial evidence.
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> [16] In the case of *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court states that "[…] questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues however, attract the more deferential standard of reasonableness" (at paragraph 51). This Court finds that in view of the context of the third issue raised it also attracts the standard of reasonableness.

[17] Further, *Dunsmuir* states at paragraph 55 :

> [55] A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> > A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
> > A discreet and special administrative regime in which the decision maker has special expertise (…).
> > The nature of the question of law. A question of law that is of "central importance to the legal system… and outside the…specialized area of expertise" of the administrative decision maker will always attract a correctness standard (…). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate. (at paragraph 55).

[18] Considering the above mentioned factors, the factual nature of the present issues, and the special expertise of the IAD, this Court finds the standard of review to be that of reasonableness. According to this standard, the Court's analysis of the Board's decision 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*, above, at paragraph 47).

[19] This Court should not interfere with the IAD assessment of credibility, since an oral hearing has been held and the IAD has had the advantage of hearing the witnesses, unless this Court can satisfy itself that the IAD based its conclusions on irrelevant considerations or that it ignored important evidence. (*Grewal v. Canada (M.C.I.)*, 2003 FC 960; *Jaglal v. Canada (M.C.I.)*, 2003 FCT 685; *Singh v. Canada (M.C.I.)*, 2002 FCT 347.

(*Thach v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 658, [2008] F.C.J. No. 834

(QL).

Erroneous findings of fact and ignorance of evidence

[41] Ms. Strulovits argues that the refusal is based on erroneous conclusions of fact without any regard to the evidence before the Board or on irrelevant considerations.

[42] The decision of the Board is consistent with the legal principles of this Court as explained recently by Justice Luc Martineau, in *Khera*, above.

[43] Contrary to Ms. Strulovits' allegations, a reading of the reasons for the decision shows that the Board did give ample reasons to justify its finding that the marriage was not genuine (Reasons and Decision: Certified Record at p. 6).

[44] The fact that Mr. Bouamoud repeatedly tried to enter Canada, did live in Canada illegally and was removed on several occasions were certainly a relevant factor in respect of his credibility.

[45] As for the finding based on the lack of a well publicized wedding reception, both Ms. Strulovits and Mr. Bouamoud were given the opportunity to give evidence on the topic and Ms. Strulovits did not choose to address the issue, although she had the burden of evidence (Minutes of the hearing: Certified Record at pp. 248-249, 305-306).

[46] As for the finding based on Mr. Bouamoud's ignorance of Ms. Strulovits' religion, again the issue was raised during the hearing and the Board was not satisfied by the answer (Minutes of the hearing: Certified Record at pp. 295-296).

[47] This is a question of credibility where a person, who is supposed to have known another for ten years and is married, is incapable of knowing such a basic fact. The finding is certainly not unreasonable.

Considerations

[48] Ms. Strulovits also argues that the Board was not entitled to look at the age difference and relies on a 2005 decision of Justice Paul Rouleau in *Khan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1372, 145 A.C.W.S. (3d) 736.

[49] As stated by Justice Martineau, in *Khera*, above, an age difference is a relevant factor for consideration to determine the genuineness of a marriage.

[50] Furthermore, in *Khan*, above, Justice Rouleau found that since the immigration officer had doubt about the genuineness of the marriage based on the age and religious difference and other factors, he should have assessed the legitimacy of the marriage through an interview:

> [20] However, despite the fact that an interview is not necessary in each case, the impugned decision raises some issues that were not reasonably addressed by the Officer. I am of the opinion that the applicant was not afforded "meaningful participation" (*Baker*, supra) with respect to defending the legitimacy of his marriage. In the present case, the officer dealt with the evidence that before him in a perverse and capricious manner by speculating on the validity of the marriage. He questioned the timing and circumstances of the applicant's marriage using four main factors: (i) the age difference, (ii) the religious difference, (iii) the speed of the marriage, and (iv) the business (rather than personal) nature of the co-owned restaurant.
>
> [21] The Officer finds that the marriage is valid, but illegitimate. However, the determination that the marriage is illegitimate was made without an interview. Each of the four factors on which the Officer made his finding can be a factor in

favour of the legitimacy of the marriage. I will briefly discuss each factor in turn, to show that the presumption of legitimacy of a valid marriage must stand, absent evidence to the contrary.

[22] The first factor - the age difference - should not be considered, as a factor in favour of, or against, the legitimacy of the marriage. The age difference, in and of itself, does not indicate that the marriage is illegitimate. If the applicant had wanted to enter into a valid but illegitimate marriage, the applicant can argue that he would not have chosen a woman who is much older. The argument can be made that the age difference is a factor mitigating in favour of a legitimate marriage. The only way to properly assess the legitimacy of the marriage is through an interview.

[23] The same argument can be made for the second factor, the religious difference. Had the applicant desired to form a valid, yet illegitimate marriage, he could have found a young Shia Muslim woman to marry him. In the opinion of the officer, a marriage to a young Shia woman would be more legitimate. The age and religious factors cannot be considered as against the legitimacy of the marriage. The religious difference should not be considered a factor against the legitimacy of the marriage, especially in a multicultural Canadian society that pledges to uphold the credo of 'unity in diversity'. Without an interview, the religious difference is not a valid concern in the present matter.

[24] The third factor - the speed of the marriage - also falls into the same category as the first two factors - an irrelevant consideration, absent an interview. Without a chance to defend the speed of the marriage, the applicant has not been afforded fairness in the present matter.

[25] Finally, the fourth factor considered by the Officer - the business was of a personal nature - is nothing more than speculation on the part of the officer. Without granting the applicant an interview, and a chance to defend the legitimacy of the marriage, the officer breached the duty of fairness.

[26] Given the officer's breach of the duty of fairness, in considering the evidence regarding the legitimacy of the marriage in a perverse and capricious manner, without granting the applicant an interview, I am of the opinion that the application for judicial review should be allowed. (Emphasis added).

[51] Finally, in *Singh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 565, 148 A.C.W.S. (3d) 465, Justice Judith Snider distinguished the *Khan* case:

> [14] The Applicant did not have an oral hearing or interview with the Officer. He submits that the Officer breached her duty of procedural fairness by considering the evidence relating to the genuineness of the relationship without the benefit of an interview. In this argument, the Applicant relies on *Khan v. Canada* (*Minister of Citizenship and Immigration*), 2005 FC 1372, [2005] F.C.J. No. 1688 (QL), where the Court determined that, since the officer had doubts about the marriage's legitimacy, it should have granted the applicant an interview to allow him "meaningful participation" in defending his relationship (esp. at paras. 20 & 26). The Applicant asks that similar reasoning be applied here.
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> [15] The Supreme Court in *Baker*, above at para. 34, stated clearly that an interview is not a general requirement for H & C decisions. The opportunity to produce full and complete written documentation in relation to all aspects of the application was held, in *Baker*, to satisfy the requirements of participatory rights required by the duty of fairness. The Applicant agreed that, in most cases, an interview is not required.
>
> [16] As interpreted by the Applicant, *Khan* would stand for the proposition that an interview is required whenever the legitimacy of a marriage or common law relationship is questioned. This interpretation ignores *Baker* and cannot be correct. *Khan* must be read in light of its facts. In my view, the facts in this case are not comparable to those in *Khan*, where the factors relied on by the officer were highly speculative or irrelevant.

[52] In this case, not only was Mr. Bouamoud granted an interview before the Visa Officer, but both Ms. Strulovits and Mr. Bouamoud were given the opportunity to testify before the Board, a factual consideration which is significantly different from the *Khan* case relied upon by Ms. Strulovits.

VI. Conclusion

[53] Ms. Strulovits has not shown that the decision is based on an erroneous finding of fact nor has it been demonstrated that the decision was made in a perverse or capricious manner or without regard for the material before it.

[54] For all of the above reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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