

Federal Court



Cour fédérale

Date: 20090918

Docket: IMM-1118-09

Citation: 2009 FC 932

Montréal, Quebec, September 18, 2009

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

JEFFREY HARRIS

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), the judicial review of a decision dated February 16, 2009 (the Decision) by the Immigration Appeal Division (IAD) in which the IAD determined that the applicant and the spouse he sponsored for permanent residence had contracted a non-genuine marriage solely to enable the latter to obtain immigration status in Canada.

I. Facts

[2] The applicant is a Canadian citizen. He was found *sincere and forthcoming* and a *credible witness* by the IAD when he testified for Khadija El Boukhari in his sponsorship appeal.

[3] According to the applicant, he was introduced by phone on September 26, 2006, to Khadija El Boukhari, a citizen of Morocco, on the occasion of her birthday, through her sister Fatima whom he had known since February 2005. Mrs. Boukhari was and is still living in Morocco.

[4] At that time the applicant was 38 years old, single, and looking for the right woman to start a family of his own, but all the women he had been dating in his thirties were divorced, either had children or did not want to start a new family. However, Mrs. Boukhari was then 27 years old, single and had never been married.

[5] After this initial contact, the applicant and Mrs. Boukhari started to chat on the Internet through a web camera and she seemed interested in him as he was in her with the result that they continued to chat regularly and kept contact.

[6] Three weeks after their first chat, the applicant proposed to Mrs. Boukhari, but she refused, saying she wanted to meet him first in person in Canada. At that time, Mrs. Boukhari had already applied for a student visa and was waiting for an answer.

[7] However, Mrs. Boukhari's application for a student visa was turned down because she had submitted forged documents in support thereof; she was found inadmissible for a period of two years, that is until December 6, 2008, for misrepresentations, pursuant to paragraph 40(2)(a) of the Act.

[8] The applicant reiterated his marriage proposal to Mrs. Boukhari who refused and said again that she wanted to meet him first in person. So, in January of 2007, the applicant decided to travel to Morocco where he and Mrs. Boukhari finally met face-to-face.

[9] As the applicant had already been welcomed in her family, and her in his, Mrs. Boukhari then accepted his proposal with the result that their marriage was celebrated on January 6, 2007, and the marriage consummated shortly thereafter.

[10] Sponsored by the applicant, Mrs. Boukhari submitted an application for permanent residence as a member of the family class. This application was denied on November 9, 2007, by a visa officer who found, pursuant to section 4 of the *Immigration and Refugee Protection Regulations* (the Regulations), that Mrs. Boukhari had not established that her marriage to the applicant was genuine, because in his opinion the marriage was entered into primarily so that Mrs. Boukhari could acquire a status of privilege under the Act.

[11] Let down by the refusal of the sponsored application of his wife for permanent residence in Canada, the applicant appealed from the visa officer's decision before the IAD.

[12] Since the marriage, the applicant has gone into debt to travel to Morocco three times: in November 2007 (11 days), in July 2008 (15 days) and from December 2008 through January 2009 (for about 22 days) in order to spend time with his wife, and has exhausted all the holiday credits allowed by his employer. Mrs. Boukhari has communicated regularly with the applicant's parents and there is no doubt that she has been well received by the applicant's family, just as the applicant has been well received by Mrs. Boukhari's family. There has been support, generosity, and understanding on both sides.

II. The impugned decision

[13] The IAD dismissed the sponsorship appeal because it found that the applicant had *not met his burden to establish, on a balance of probabilities, that his marriage to [Mrs. Boukhari] is genuine or that it was not entered into primarily to allow [Mrs. Boukhari] to acquire a status or a privilege under the Act.*

[14] In reaching this decision, the IAD did not doubt that the applicant was sincere and credible; however, it found that Mrs. Boukhari was not credible and that immigration to Canada was the primary factor for her when she agreed to marry the applicant.

[15] The IAD then examined whether the marriage, which in its opinion was not genuine initially, became genuine later, but it found that the evidence was insufficient to conclude that, on the day of the hearing, the marriage was genuine. It also noted that according to section 121 of the

Act, the marriage had to be genuine both at the time of the application for permanent residence and at the time of the hearing of the sponsorship appeal.

[16] In this application, the applicant argues that the IAD misconstrued the facts and made a number of reversible errors.

III. Issues

[17] The applicant raised five issues in his memorandum attacking the IAD's decision. The applicant, however, in his oral argument directed his attention mainly to three of them. They will be restated as follows:

- a. Did the IAD err in its credibility findings?
- b. Did the IAD render an unreasonable decision?
- c. Did the IAD violate the principle of procedural fairness?

IV. Relevant legislation

[18] The following sections of the *Act* are relevant to this case:

3. (1) The objectives of this *Act* with respect to immigration are [...]

(d) to see that families are reunited in Canada;

63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the

3. (1) En matière d'immigration, la présente loi a pour objet : [...]

d) de veiller à la réunification des familles au Canada;

63. (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial

family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.

peut interjeter appel du refus de délivrer le visa de résident permanent.

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.

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 wrong in law or fact or mixed law and fact;
 - (b) a principle of natural justice has not been observed;
- or

- a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
- b) il y a eu manquement à un principe de justice naturelle;

[...]

[...]

175. (1) The Immigration Appeal Division, in any proceeding before it,

175. (1) Dans toute affaire dont elle est saisie, la Section d'appel de l'immigration

[...]

[...]

- (b) is not bound by any legal or technical rules of evidence;

- b) n'est pas liée par les règles légales ou techniques de

and	présentation de la preuve;
(c) may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances.	c) peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision.

[19] The following sections of the Regulations are also relevant to this case:

2. The definitions in this section apply in these Regulations	2. Les définitions qui suivent s'appliquent au présent règlement
[...]	[...]
“marriage”, in respect of a marriage that took place outside Canada, means a marriage that is valid both under the laws of the jurisdiction where it took place and under Canadian law.	«mariage» S'agissant d'un mariage contracté à l'extérieur du Canada, mariage valide à la fois en vertu des lois du lieu où il a été contracté et des lois canadiennes.
[...]	[...]
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.	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.

121. The requirements with respect to a person who is a member of the family class or a family member of a member of the family class who makes an application under Division 6 of Part 5 are the following:

(a) the person is a family member of the applicant or of the sponsor both at the time the application is made and, without taking into account whether the person has attained 22 years of age, at the time of the determination of the application.

121. Les exigences applicables à l'égard de la personne appartenant à la catégorie du regroupement familial ou des membres de sa famille qui présentent une demande au titre de la section 6 de la partie 5 sont les suivantes :

a) l'intéressé doit être un membre de la famille du demandeur ou du répondant au moment où la demande est faite et, qu'il ait atteint l'âge de vingt-deux ans ou non, au moment où il est statué sur la demande.

V. Standard of Review

[20] With the first two issues, at the end of the day, are raised questions of fact and credibility. Is the applicant's marriage a genuine one? This is a "jurisdictional fact", which is subject to the same standard of review as other questions of fact. When it found that the marriage in issue was entered into by Mrs. Boukhari primarily to gain admission to Canada, the IAD excluded her from the family class. In essence, therefore, the two issues are factual and involve the IAD's appreciation of the applicant's evidence and the credibility of the applicant and his wife.

[21] The standard of review applicable to a finding of credibility or fact on the part of a Board is one of reasonableness. This is a deferential standard which recognizes that certain questions before

administrative tribunals do not lend themselves to one specific, particular result, but instead give rise to a number of possible and reasonable conclusions (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, at paragraph 47). Where the decision at issue falls within that spectrum, the Court should not interfere.

[22] 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).

[23] It is undisputed that if the Board makes findings of fact that are erroneous or made in a perverse or capricious manner, or without regard for the material before it, there is a reviewable error (*Harb v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 108. (FCA)).

[24] Since an oral hearing has been held and the IAD has had the advantage of hearing the witnesses, this Court should not interfere with the IAD assessment that the marriage is not genuine, unless this Court can satisfy itself that the IAD based its conclusions on irrelevant considerations or that it ignored important evidence (*Grewal v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 960; *Jaglal v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 685; *Singh v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 347).

VI. Analysis

Credibility findings

[25] The IAD based its adverse credibility findings mainly on the following inconsistencies found in Mrs. Boukhari's testimony:

- a. She told the visa officer that her sister had taken the opportunity of her marriage to join in the celebration and make public her own second marriage. But at the hearing she testified that there was only one marriage and it was her marriage.
- b. She told the visa officer that she did not know about the applicant's past relationships because she had not asked. At the hearing, she testified that she did know and when the Panel questioned her, she confirmed that she had talked about the appellant's past with him before the interview.
- c. She told the visa officer that her parents did not have a problem with the marriage as long as the applicant converted to Islam. Before the IAD, she testified under oath that she did not make that statement to the visa officer.

First alleged contradiction

[26] The IAD saw a contradiction between the two versions while in effect there was none, and as a result, asked Mrs. Boukhari to explain her statement to the visa officer. She then repeated that

there was only one marriage and it was her marriage. How could Mrs. Boukhari be blamed for not explaining a contradiction that did not exist. The overwhelming evidence of record is to the effect that there was only one marriage, her marriage to the applicant, and that her sister Fatima may have made public on that occasion her own marriage which took place in Canada. One thing is certain. In view of the overwhelming evidence, Fatima was not present as a bride, but as a maid of honour. Therefore, the IAD had no factual ground here to impeach Mrs. Boukhari's credibility.

Second alleged contradiction

[27] The fact that that Mrs. Boukhari did not know much about the applicant's relationships *before her marriage* because she had not made inquiries in that respect does not contradict her testimony before the IAD that she had talked about the applicant's relationships with him before the interview. She told the visa officer though that she knew he had never been married nor lived common law. The fact that Mrs. Boukhari did not inquire more about the applicant's past, and just relied on her own sister Fatima who knew the applicant and made the introduction, does not constitute a valid reason to attack her credibility and the genuineness of her marriage. There is no better recommendation than one made by a trusting and caring sister who attested knowing the applicant well. It is a well known fact that *love is blind*. There is no need for someone to make an inquiry before falling in love, although it may be more prudent to do so before marriage rather than after. Again, the Court is of the view that the facts do not warrant the negative credibility finding of the IAD against Mrs. Boukhari. The *major discrepancy* finding of the IAD is not supported by the evidence and cannot stand.

Third alleged contradiction

[28] The IAD saw another major discrepancy and had difficulty understanding why the visa officer would have made the reported statement that Mrs. Boukhari's *parents did not have a problem with the marriage*. Whether Mrs. Boukhari made the alleged statement or not does not change the fact that her family participated in the celebration of the marriage and had obviously no objection to it, and this, even though the applicant had not converted to Islam. In addition, one must not forget that the statement made by Mrs. Boukhari to the IAD was made under oath and the evidence overwhelmingly corroborated her testimony. Therefore; she had no valid reason to rebut the unsworn notes of the visa officer. She simply told the truth which is the best explanation she could give against her alleged prior statement. Again, the Court is of the view that there are no facts warranting unfavourable inferences as to Mrs. Boukhari's credibility; indeed, the IAD had no sufficient ground to find a major discrepancy in this case.

[29] To summarize, the Court, having analysed the evidence, is unable to find significant discrepancies in the statements compared by the IAD. It cannot be found that Mrs. Boukhari lacked credibility and that, as a result, her marriage was not genuine.

[30] It is true that Mrs. Boukhari made several attempts to come to Canada before her marriage and that she has siblings in Canada. That being said, without the significant discrepancies raised by the IAD, the existence of which have been rejected by the Court, the IAD could not rule, on the basis of the remaining evidence, that, *on a balance of probabilities, immigration to Canada was the primary factor for [Mrs. Boukhari] when she agreed to marry the [applicant]*.

Period of inadmissibility

[31] If, on one hand, the IAD was entitled to consider, with respect to Mrs. Boukhari's credibility, the fact that she had been declared inadmissible for a period of two years for having submitted false documents in support of her third application for a visa to enter Canada. It was, on the other hand, an error for the IAD to base its refusal on that second ground since it was no longer applicable at the date of the hearing.

[32] In fact, the inadmissibility that had been imposed by a visa officer on December 6, 2006 for a period of two years expired on December 6, 2008, and not in January 2009, as the IAD wrongly mentioned in its decision. Therefore, on December 18, 2008, the date of the hearing of the appeal, the period of inadmissibility had already expired and could not constitute a second ground of refusal for the IAD.

Procedural fairness

[33] Having ruled that the IAD erred in its credibility findings and that its decision as a result was unreasonable, it is unnecessary for the Court to address the issue of procedural fairness raised by the applicant.

VII Conclusion

[34] For all these reasons, the Court rules that the IAD made erroneous findings on the basis of irrelevant and insignificant factors and acted in a capricious manner. It attacked Mrs. Boukhari's

credibility without regard to the overwhelming evidence that, properly interpreted, could have confirmed the genuineness of her marriage. By focusing only on one motive for the marriage, the IAD failed to focus on the couple's intention to stay together, to love and care for each other and to start a new family, as corroborated by many witnesses.

[35] How could the IAD conclude that the marriage in issue was entered into by Mrs. Boukhari's *primarily* for the purpose of acquiring a status or privilege under the Act, since the IAD did not even try to compare that purpose for the marriage with the real intention the couple had at the time of the marriage? Why not consider also the abundant evidence corroborating the fact that they are still deeply in love, in spite of all the difficulties they have suffered since the consummation of their marriage? Is that not the manner in which the IAD should have proceeded before finding that the impugned marriage was not genuine?

[36] In view of the conclusion of the Court on the IAD's credibility findings and its obvious error on the inadmissibility issue, the Court has no other alternative but to annul the impugned decision.

[37] The Court agrees with the parties that there is no question of general interest to certify.

JUDGMENT

FOR THE FOREGOING REASONS, THE COURT allows the application and refers the matter back to a newly constituted panel for redetermination.

“Maurice E. Lagacé”

Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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AND JUDGMENT BY:** LAGACÉ D.J.

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