Federal Court  Cour fédérale

Date: 20100312

Docket: IMM-6-09

Citation: 2010 FC 288

Ottawa, Ontario, March 12, 2010

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

ZAHEED AHMED ABBASI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The present Application is a challenge to a Visa Officer's refusal to grant a permanent resident visa to the Applicant, Mr. Abbasi, as a member of the family class. Mr. Abbasi is a Pakistan national who is being sponsored for landing in Canada by his wife, Ms. Nora Bautista, who is a temporary resident. The refusal of the sponsorship application is based on a finding that the marriage of the couple is not genuine.

[2] Two grounds are advanced for setting aside the Visa Officer's decision: the finding that the marriage is not genuine is unreasonable; and the process applied in reaching the decision offends the

Official Languages Act, R.S., 1985, c. 31 because the Visa Officer's interview of Mr. Abbasi was conducted in Urdu. For the reasons which follow I find that the challenge succeeds on the first ground, but fails on the second.

I. Is the Decision Unreasonable?

A. *The nature of the visa application*

[3] Ms. Bautista is a Philippines national who applied for permanent resident status in Canada as a "live-in caregiver". In this capacity, with respect to her sponsorship of her husband, she was required to comply with s.114 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*Regulations*):

Family Members Requirement	*Exigence applicable aux membres de la famille*
114. The requirement with respect to a family member of a live-in caregiver applying to remain in Canada as a permanent resident is that the family member was included in the live-in caregiver's application to remain in Canada as a permanent resident at the time the application was made.	**114.** L'exigence applicable à la demande de séjour à titre de résident permanent d'un membre de la famille d'un aide familial est que l'intéressé était visé par la demande de séjour de ce dernier à titre de résident permanent au moment où celle-ci a été faite.
114.1 A foreign national who is a family member of a live-in caregiver who makes an application to remain in Canada as a permanent resident shall become a permanent resident if, following an examination, it is established that	**114.1** L'étranger qui est un membre de la famille de l'aide familial qui présente une demande de séjour au Canada à titre de résident permanent devient résident permanent si, à l'issue d'un contrôle, les éléments ci-après sont établis :
(*a*) the live-in caregiver has become a permanent resident; and	*a*) l'aide familial est devenu résident permanent;

(*b*) the foreign national is not inadmissible.	*b*) l'étranger n'est pas interdit de territoire.

[Emphasis added]

With respect to Mr. Abbasi being a "spouse" of Ms. Bautista as required by s.114, s. 4 of the *Regulations* requires certain proof of the quality of the marriage:

Family Relationships	*Notion De Famille*
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 conjointsde 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.

B. ***The evidence with respect to the marriage***

[4] In October 2001, Mr. Abbasi was on a six-month visit to Hong Kong when he first met Ms. Bautista who was working as a domestic helper there. On November 17, 2001, Mr. Abbasi proposed marriage to Ms. Bautista. Approximately two months after the marriage proposal, Mr. Abbasi returned to Pakistan while Ms. Bautista remained in Hong Kong. After an engagement of five years, Ms. Bautista, who had moved from Hong Kong to Canada in September 2006, travelled to Pakistan and married Mr. Abbasi on December 11, 2006 in Abbottabad, Pakistan. After celebrating the marriage and spending some time with Mr. Abbasi and his family, Ms. Bautista returned to Canada in January 2007. Ms. Bautista made her permanent residence application in

October 2007 while she was working in Toronto as a live-in caregiver. Both before and after the marriage, the couple maintained their relationship through email, telephone contact, and written correspondence.

C. *The Visa Officer's decision*

[5] Before the Visa Officer fully reviewed the evidence presented in support of the visa application, including the interview with Mr. Abbasi, concerns existed as to whether the marriage met the standard set by s. 4 of the *Regulations*. The Visa Officer confirmed in his affidavit filed in the present Application that he knew of these concerns before entering into the decision-making process:

> Further documents were received and reviewed by the case analyst who had concerns regarding the incomplete Personal History Form, non-compliance for a request for National Identity Card of the applicant and original marriage certificate. The file was then referred to me for review and advice on the next course of action.
>
> After I had reviewed the file, it was queued for an interview as there were concerns regarding the bona fides of the relationship between the in-Canada applicant and her overseas family member.
>
> (Respondent's Motion Record, p. 6, paras. 5 and 6)

[6] On September 10, 2008, the Visa Officer interviewed Mr. Abbasi for the purpose of establishing whether a misrepresentation had been made about the genuineness of his marriage to Ms. Bautista. The computerized (CAIPS) notes of the interview provide a running commentary of the questions asked and the answers provided (Applicant's Record, pp. 14 – 19). During the

interview the Visa Officer asked probing and detailed questions about Mr. Abbasi's relationship with Ms. Bautista. As result, the Visa Officer came to the following conclusions:

> Genesis and development of relationship, although possible, raises concerns. Unlikely that the PA [principal applicant] and SP [sponsor] would meet by chance. Decided to marry each other during that chance visit after such a short period of time. Are unable to provide photos taken during that visit yet could of random people the PA met during trip and did not know ahead of time, not see each other over such an extensive period of time since that meeting and engagement, then get engaged and married such a long period of time after their original meeting.
>
> Insufficient evidence that would indicate relationship is genuine such as regular and continuous communication when apart, efforts to visit or spend time together, joint financial affairs or obligations, contact on special occasions has been provided. Does not appear that PA and SP have made genuine attempt to combine their affairs as is normally seen in a genuine relationship based on the evidence that has been provided [sic]. Much of the evidence such as greeting cards, appear to have been purchased in order to strengthen the application and not as a result of genuine communication between the PA and SP.
>
> PA had difficulty answering basic questions about spouse, that one could reasonably be expected to be able to answer about spouse, and appeared to show little knowledge of their [sic] spouse, despite time that has passed since marriage. Even for an arranged marriage this is very strange, as normally after marriage in a genuine marriage PA and SP wish to learn more about each other to cement relationship. Also applicants are normally very interested in learning about SP's life in Canada, the life that they are soon to join. PA had difficulty answering basic questions such as the age of the children that the SP took care of, her work house or other details of her employment except in the most general of terms, and generally showed little knowledge of the sponsor.
>
> (Applicant's Record, p. 19)

Consequently, Mr. Abbasi was notified by letter dated November 12, 2008 as follows:

> You were interviewed at this High Commission on September 10, 2008. The concerns related to your application have been communicated to you and I have taken your reply in consideration. I

> have determined that your marriage is not genuine and was entered into primarily for the purpose of acquiring status or privilege under the Act.
>
> As a result, for the purpose of the regulations, you are not considered a spouse and are therefore not a member of the family class.
>
> Subsection 11(1) of the Act provides that a foreign national must, before entering Canada, apply to an officer for a visa or any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act. For the reasons stated above, I am not satisfied that you are not inadmissible and that you meet the requirements of the Act. I am therefore refusing your application.
>
> (Applicant's Record, p. 11)

D. *Conclusion*

[7] In written argument Counsel for the Applicant submits that the negative conclusions reached by the Visa Officer are unreasonable because the particular circumstances of Mr. Abbasi's marriage were not typical or "normal", and, therefore, the Visa Officer was in error in applying criterion used in typical sponsorship applications to determine the genuineness of the marriage. In addition, in oral argument, Counsel for the Applicant submitted that to determine the true nature of the marriage both Mr. Abbasi and Ms. Bautista should have been interviewed. I find that the arguments have weight.

[8] The circumstances of the marriage are unusual, which, not surprisingly, raised suspicion. But, the unusual circumstances should also have given pause for very careful consideration. A marriage is a union between two individuals, and where suspicion exists as to the genuineness of the union because an expected standard of conduct is not met, to fairly and properly deal with the suspicion, the evidence of each individual must be carefully considered. There is no evidence on the

record that the Visa Officer provided Ms. Bautista with an opportunity to give her evidence with respect to the quality of the marriage before the decision under review was made. In my opinion, in a case such as this the Visa Officer was required to interview both Mr. Abbasi and Ms. Bautista by the best means available whether by teleconference, video conference, or personal interview.

[9] The standard for review on the present issue is stated in *Dunsmuir v. New Brunswick* , 2008 SCC 9 at paragraph 47:

> 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.

[10] In my opinion because the evidence is fundamentally deficient as described, no defensible outcome exists. Therefore, I agree with Counsel for Mr. Abbasi's argument that the decision under review is unreasonable and, thus, was rendered in reviewable error.

II. Was the Interview Conducted in Breach of the *Official Languages Act*?

[11] Two factors are important to note with respect to this issue. First, the interview was conduced in Urdu at Mr. Abbasi's request. In his visa application, Mr. Abbasi was given a preferred language choice between English, French and "other" to which he signified "Urdu" as his preference. This choice was confirmed by the Visa Officer at the opening to the interview:

> FN interviewed in Urdu. At his / her request, no interpreter required as I am fluent in this language. FN stated that he is not fluent in English.
>
> (Applicant's Record, p. 14)

And second, no objection has been made in affidavit evidence by Mr. Abbasi in the present Application either to the conduct of the interview or with respect to the accuracy of the notes made of the conversation that transpired during the interview.

[12] Nevertheless, Counsel for Mr. Abbasi argues that, as a matter of law, the Visa Officer was required to conduct the interview in either English or French through an interpreter who could interpret the Visa Officer's questions to Mr. Abbasi in Urdu and his answers back into English or French to the Visa Officer. In support of this argument Counsel for Mr. Abbasi served notice of a constitutional challenge to s. 11 and 12 of *IRPA* and s. 4 of the *Regulations*. However, during the course of the hearing of the present Application, Counsel for Mr. Abbasi abandoned the constitutional challenge and, thereby, restricted the argument to the correct interpretation of the *Official Languages Act.*

A. *Counsel for Mr. Abbasi's interpretation argument*

[13] The principal support for the argument that the Visa Officer was required to conduct the interview in either English or French is found in s. 16 and s. 20(1) of the *Charter*:

Official languages of Canada	Langues officielles du Canada
16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.	16. (1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.

Communications by public with federal institutions	Communications entre les administrés et les institutions fédérales
[…]	[…]
20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where	20. (1) Le public a, au Canada, droit à l'emploi du français ou de l'anglais pour communiquer avec le siège ou l'administration centrale des institutions du Parlement ou du gouvernement du Canada ou pour en recevoir les services; il a le même droit à l'égard de tout autre bureau de ces institutions là où, selon le cas :
(a) there is a significant demand for communications with and services from that office in such language; or	*a)* l'emploi du français ou de l'anglais fait l'objet d'une demande importante;
(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.	*b)* l'emploi du français et de l'anglais se justifie par la vocation du bureau.

[14] With respect to the official languages of Canada and the right conveyed in s. 20(1) to receiving services in either language, Counsel for the Applicant argues that, because the *Official Languages Act* is “a quasi-constitutional document that not only mirrors but implements the constitutional bilingual order”, sections 21 to 24 of the *Official Languages Act* require that the

business of federal institutions must be conducted in English and French and no other language (Hearing transcripts, January 20, 2010, p. 10):

PART IV COMMUNICATIONS WITH AND SERVICES TO THE PUBLIC COMMUNICATIONS AND SERVICES	PARTIE IV COMMUNICATIONS AVEC LE PUBLIC ET PRESTATION DES SERVICES COMMUNICATIONS ET SERVICES
21. Any member of the public in Canada has the right to communicate with and to receive available services from federal institutions in accordance with this Part.	**21.** Le public a, au Canada, le droit de communiquer avec les institutions fédérales et d'en recevoir les services conformément à la présente partie.
22. Every federal institution has the duty to ensure that any member of the public can communicate with and obtain available services from its head or central office in either official language, and has the same duty with respect to any of its other offices or facilities (*a*) within the National Capital Region; or (*b*) in Canada or elsewhere, where there is significant demand for communications with and services from that office or facility in that language.	**22.** Il incombe aux institutions fédérales de veiller à ce que le public puisse communiquer avec leur siège ou leur administration centrale, et en recevoir les services, dans l'une ou l'autre des langues officielles. Cette obligation vaut également pour leurs bureaux — auxquels sont assimilés, pour l'application de la présente partie, tous autres lieux où ces institutions offrent des services — situés soit dans la région de la capitale nationale, soit là où, au Canada comme à l'étranger, l'emploi de cette langue fait l'objet d'une demande importante.
23. (1) For greater certainty, every federal institution that provides services or makes them available to the travelling public has the duty to ensure that any member of the travelling public can communicate with and obtain those services in either official language from any office or facility of the institution	**23.** (1) Il est entendu qu'il incombe aux institutions fédérales offrant des services aux voyageurs de veiller à ce que ceux-ci puissent, dans l'une ou l'autre des langues officielles, communiquer avec leurs bureaux et en recevoir les services, là où, au

in Canada or elsewhere where there is significant demand for those services in that language.

Canada comme à l'étranger, l'emploi de cette langue fait l'objet d'une demande importante.

(2) Every federal institution has the duty to ensure that such services to the travelling public as may be prescribed by regulation of the Governor in Council that are provided or made available by another person or organization pursuant to a contract with the federal institution for the provision of those services at an office or facility referred to in subsection (1) are provided or made available, in both official languages, in the manner prescribed by regulation of the Governor in Council.

(2) Il incombe aux institutions fédérales de veiller à ce que, dans les bureaux visés au paragraphe (1), les services réglementaires offerts aux voyageurs par des tiers conventionnés par elles à cette fin le soient, dans les deux langues officielles, selon les modalités réglementaires.

24. (1) Every federal institution has the duty to ensure that any member of the public can communicate in either official language with, and obtain available services in either official language from, any of its offices or facilities in Canada or elsewhere

24. (1) Il incombe aux institutions fédérales de veiller à ce que le public puisse communiquer avec leurs bureaux, tant au Canada qu'à l'étranger, et en recevoir les services dans l'une ou l'autre des langues officielles :

(*a*) in any circumstances prescribed by regulation of the Governor in Council that relate to any of the following:

(i) the health, safety or security of members of the public,

(ii) the location of the office or facility, or

(iii) the national or international mandate of the office; or

a) soit dans les cas, fixés par règlement, touchant à la santé ou à la sécurité du public ainsi qu'à l'emplacement des bureaux, ou liés au caractère national ou international de leur mandat;

(*b*) in any other circumstances prescribed by regulation of the Governor in Council where, due to the nature of the office or facility, it is reasonable that communications with and services from that office or facility be available in both official languages.

b) soit en toute autre circonstance déterminée par règlement, si la vocation des bureaux justifie l'emploi des deux langues officielles.

(2) Any federal institution that reports directly to Parliament on any of its activities has the duty to ensure that any member of the public can communicate with and obtain available services from all of its offices or facilities in Canada or elsewhere in either official language.	(2) Il incombe aux institutions fédérales tenues de rendre directement compte au Parlement de leurs activités de veiller à ce que le public puisse communiquer avec leurs bureaux, tant au Canada qu'à l'étranger, et en recevoir les services dans l'une ou l'autre des langues officielles.
(3) Without restricting the generality of subsection (2), the duty set out in that subsection applies in respect of (*a*) the Office of the Commissioner of Official Languages; (*b*) the Office of the Chief Electoral Officer; (*b.1*) the Office of the Public Sector Integrity Commissioner; (*c*) the Office of the Auditor General; (*d*) the Office of the Information Commissioner; (*e*) the Office of the Privacy Commissioner; and (*f*) the Office of the Commissioner of Lobbying.	(3) Cette obligation vise notamment : *a*) le commissariat aux langues officielles; *b*) le bureau du directeur général des élections; *b.1*) le commissariat à l'intégrité du secteur public; *c*) le bureau du vérificateur général; *d*) le commissariat à l'information; *e*) le commissariat à la protection de la vie privée; *f*) le Commissariat au lobbying.

[15] In response, relying upon the decision of the Supreme Court of Canada in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773 (*Lavigne*),

Counsel for the Respondent argues that when access to government services is offered to members

of the public in the official language of their choice, the requirements of the *Official Languages Act* are met. In *Lavigne*, at paragraphs 22 and 23, Justice Gonthier wrote:

> Section 2 of the Official Languages Act sets out the purpose of the Act:
>
> > 2. The purpose of this Act is to
> >
> > (a) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions;
> > (b) support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society; and
> > (c) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada.
>
> Those objectives are extremely important, in that the promotion of both official languages is essential to Canada's development. As this Court said in Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, at p. 744:
>
> > The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

The Official Languages Act is more than just a statement of principles. It imposes practical requirements on federal institutions, as Bastarache J. wrote in R. v. Beaulac, [1999] 1 S.C.R. 768, at para. 24:

> The idea that s. 16(3) of the Charter, which has formalized the notion of advancement of the objective of equality of the official languages of Canada in the Jones case, supra, limits the scope of s. 16(1) must also be rejected. This subsection affirms the substantive equality of those constitutional language rights that are in existence at a given time. Section 2 of the Official Languages Act has the same effect with regard to rights recognized under that Act. This principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State; see McKinney v. University of Guelph, [1990] 3 S.C.R. 229, at p. 412; Haig v. Canada, [1993] 2 S.C.R. 995, at p. 1038; Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, at para. 73; Mahe, supra, at p. 365. It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation.

The importance of these objectives and of the constitutional values embodied in the Official Languages Act gives the latter a special status in the Canadian legal framework. Its quasi-constitutional status has been recognized by the Canadian courts. For instance, in Canada (Attorney General) v. Viola, [1991] 1 F.C. 373, at p. 386 (see also Rogers v. Canada (Correctional Service), [2001] 2 F.C. 586 (T.D.), at pp. 602-3), the Federal Court of Appeal said:

> The 1988 Official Languages Act is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and (3) of the Canadian Charter of Rights and Freedoms, it follows the rules of interpretation of that Charter as they have been defined by the Supreme Court of Canada. To the

> extent also that it is an extension of the rights and guarantees recognized in the Charter, and by virtue of its preamble, its purpose as defined in section 2 and its taking precedence over other statutes in accordance with subsection 82(1), it belongs to that privileged category of quasi-constitutional legislation which reflects "certain basic goals of our society" and must be so interpreted "as to advance the broad policy considerations underlying it."

B. *Conclusion*

[16] Section 20(1) of the *Charter* provides a right to any member of the public in Canada to communicate with and receive available services from federal institutions in English and French. As confirmed in *Lavigne*, this right imposes an obligation and practical requirements on federal institutions to comply with the right. I agree with Counsel for the Respondent that this rights based concept does not inhibit federal institutions to offer services in languages other than English or French if the members of the public involved do not wish to exercise their right under s. 20(1) of the *Charter*, and, indeed, wish to conduct business in any other language to which the institution's officials are capable of reliably communicating without an interpreter. This point was made by Justice Pinard in *Toma v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1000 at paragraph 33 where a visa officer conducted an interview in Arabic without an interpreter:

> If the officer speaks the applicant's language – as was the case here – it would be strange indeed for the office to use an interpreter. There would be no need to do so. The preferable options, as the Manual suggests [*Overseas Processing Manual (OP) 5*], is to conduct the interview in the applicant's language.

[17] Therefore, on the facts of the present case as described above, I find no breach of the *Official Languages Act*.

III. Result

[18] Given that the decision under review is unreasonable as found in Section I above, I find that the decision under review was made in reviewable error.

[19] Accordingly, I set aside the decision under review and refer the matter back to a different visa officer for re-determination.

[20] During the hearing of the present Application, Counsel for Mr. Abbasi requested a question be certified on the issue of the correct interpretation of the *Official Languages Act*. In my opinion, the following question is of general importance and, but for the determination which has caused the decision under review to be set aside, is determinative of the present Application. Therefore, it is certified for consideration by the Federal Court of Appeal:

> Is it a breach of the *Official Languages Act* for a visa officer to conduct an interview with respect to a visa application when, at the applicant's request, the language of the interview is other than English or French and the visa officer is able to comply with the request?

[21] I find no special reason to award costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The Application for Judicial Review is allowed, the decision of the Visa Officer is set aside, and the matter is sent back for re-determination by a different visa officer.

2. The following question is certified:

> Is it a breach of the *Official Languages Act* for a visa officer to conduct an interview with respect to a visa application when, at the applicant's request, the language of the interview is other than English or French and the visa officer is able to comply with the request?

3. No order as to costs.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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