

Date: 20110413

Docket: IMM-3983-10

Citation: 2011 FC 454

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, April 13, 2011

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Applicant

and

PLACIDE OLEMBO OYEMA

Respondent

REASONS FOR JUDGEMENT AND JUDGMENT

[1] This is an application for judicial review brought by the Minister of Citizenship and Immigration under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27, of a decision of the Immigration and Refugee Board's Immigration Appeal Division (the IAD), which allowed the respondent's appeal of the refusal of his spouse's application for permanent residence in the family class.

BACKGROUND

[2] The respondent left the Democratic Republic of Congo (the DRC) for Canada in 2002. He claimed refugee protection, which was granted. He became a permanent resident on June 14, 2005. He asked Ms. Rose Uya-Numondjo to marry him and she became his spouse on January 6, 2005. On October 2, 2005, in Québec, he signed a power of attorney empowering his brother to proceed with the marriage on his behalf in the DRC. The customary marriage was solemnized on October 15, 2005, and the civil marriage on November 18, 2005.

[3] A visa officer refused the respondent's sponsorship application on the ground that he had failed to prove that the marriage was valid under the laws of the DRC. The visa officer also determined that the respondent's marriage was not genuine and had been entered into primarily for the purpose of acquiring a status or privilege under the Act.

[4] The respondent appealed this decision before the IAD. On May 27, 2010, the IAD allowed the respondent's appeal. The IAD determined that, given all of the evidence, the legal validity of the marriage had been established on a balance of probabilities and the relationship between the respondent and his spouse was genuine and had not been entered into for the purpose of acquiring any privilege or status under the Act. This decision is the subject of the current judicial review.

ISSUES

[5] The current application for judicial review raises the following two issues:

- 1) Did the IAD err in determining that the respondent's marriage was legally valid?

- 2) Did the IAD err in determining that the applicant's relationship was genuine and was not entered into for the purpose of acquiring any privilege or status under the Act?

APPLICABLE STANDARDS OF REVIEW

[6] The first issue raised is the IAD's interpretation of foreign law, in this case, the Congolese Family Code (the Congolese Code), in determining whether the marriage contract was legally valid. The case law of our Court has established that this type of question must be reviewed on a reasonableness standard (*Canada (Minister of Citizenship and Immigration) v. Saini*, 2001 FCA 311, at para. 26; *Butar v. Canada* 2006 FC 1281, at para. 9; *Wai v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 364, at para. 14.

[7] The second issue involves the IAD's assessment of the good faith of the respondent's marriage, in light of the evidence before it. According to the case law, this is also a question of fact that must be reviewed on a reasonableness standard (*Thach v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 658, at para. 15).

ANALYSIS

- The relevant sections of the Congolese Code are found in Appendix A.

1) Did the IAD err in determining that the respondent's marriage was legally valid?

[8] The applicant submits that the IAD erred in determining that the respondent had established that his proxy marriage was valid under Congolese law. The Congolese Code stipulates that

marriage by proxy constitutes an exceptional regime and that its legal validity is subject to prior legal authorization.

[9] Such authorization from a justice of the peace is an essential condition in order to be able to be exempt from the general regime of marriage. The documents produced made no reference to the existence of such authorization and the respondent had failed to have his spouse or brother testify on the matter. Thus, the IAD erred in determining that the respondent's brother and uncle "had carried out all of the required procedures in the DRC" for him to be able to legally marry by proxy while he was still in Canada. Moreover, the name of the applicant's proxy appears nowhere on the act of marriage, which was filled out and signed as if the applicant himself had been present. The IAD erred by failing to consider these factors.

[10] In addition, section 397 of the Congolese Code to which the IAD refers and which seems to allow a husband to ratify consent in a marriage where consent was not given or was vitiated does not resolve the issue since the respondent had not established that Congolese law allowed for the need to obtain legal authorization to be bypassed. The IAD erroneously lowered the respondent's burden of proof by not requiring that this be established.

[11] Lastly, the IAD erred in attaching undue weight to the fact that the act of marriage and the confirmation letter for the customary marriage were genuine documents. The IAD should have taken into account the legal principle whereby the appearance of authenticity of a document issued by a foreign state simply creates a presumption of validity which may be rebutted.

[12] For his part, the respondent argues that the Minister called no expert witnesses to testify about the legality of his marriage and that he impugned its validity by interpreting the wording of the law only in a general sense. The authenticity of the documentary evidence with regard to the marriage was never called into question by the visa officer or the IAD panel. The IAD analyzed all of the provisions of the Congolese Code and made a distinction between a normal marriage and a marriage by proxy.

[13] He further argues that the IAD was right when it determined that representation by proxy was part of the provisions addressing the consent of the persons involved and that the legal provisions regarding the ratification of marriage by consent applied in this case. The IAD's interpretation of the scope of section 397, which deals with the ratification of a lack of consent, is reasonable and is supported by the text cited. There exists a principle of judicial deference with regard to decisions of the IAD due to its particular expertise and the Court should not intervene.

[14] Did the IAD disregard an essential condition of a marriage by proxy: that it is subject to legal authorization? I do not believe so.

[15] In the first place, the IAD considered the applicant's doubts as to the validity of the respondent's marriage:

The Minister challenged the validity of this proxy marriage on the ground that the power of attorney, sworn and executed in Quebec, had not been not signed by a justice of the peace in the DRC and had not been given for a serious reason, in accordance with article 351 of book three of the Code (CC of the DRC) and that certain other formal requirements had not been respected, including those at articles 370 and 373 of book three of the CC of the DRC. (IAD Decision, at para. 8).

[16] The IAD proceeded with the analysis and common-sense interpretation of the provisions of the Congolese Code, as agreed by the panel and the parties at the hearing. In spite of the arguments raised by the applicant, the panel determined that the marriage by proxy was valid in law:

Regarding the first ground for refusal, I am of the opinion that the marriage by proxy between the appellant and the applicant is valid in law. Even though on its face, the power of attorney in the record did not fulfill all of the procedures required by articles 351, 370 and 373 of the CC of the DRC, the appellant's explanations on this point were satisfactory. (IAD Decision, at para. 10).

[17] In fact, the respondent testified at the hearing that:

- he came to Canada as a refugee;
- that his life would have been at risk had he returned to the Congo;
- with the power of attorney, his family, that is, his brother and uncle, had carried out all of the required procedures in the DRC;
- it was on that basis that the civil registrar had agreed to confirm the validity of the customary marriage and solemnize the civil marriage, both of which were solemnized with the appellant's and the applicant's families in attendance;
- the signature appearing beside his name on the act of marriage was his brother's, not his own; and
- that the appellant checked for himself with the relevant authorities in the DRC to make sure that the documents were genuine before he went ahead with his sponsorship application. (IAD Decision, at para. 9)

[18] In addition, the authenticity of the respondent's marriage documents was never called into question, either by the IAD or the visa officer:

Furthermore, the civil registrar agreed to provide a confirmation letter for the customary marriage and to solemnize the civil marriage. Genuine documents provide evidence of the validity of these marriages. The customary marriage was confirmed by the mayor and civil registrar of the commune of Ngaliema, as evidenced by the conformation letter issued on December 2, 2005. The civil marriage was solemnized by the civil registrar's representative, as evidenced by the

act of marriage issued on November 18, 2005, by the civil registrar and mayor of the commune of Ngaliema, city of Kinshasa.

[19] The applicant complains that the IAD attached undue weight to the fact that the act of marriage and the confirmation letter for the customary marriage were genuine documents and that it should have considered the fact that the presumption of their validity could have been rebutted.

With respect, I do not agree with this view. The IAD simply found that the respondent's explanations and interpretation of Congolese law were sufficient to support the legal validity of his marriage. This interpretation does not appear to be unreasonable to me.

[20] The respondent also submits that the IAD could not have relied on section 397 of the Congolese Code to determine that the marriage was valid in law and disregard irregularities and the lack of legal authorization with regard to the proxy marriage.

[21] Section 397 of the Congolese Code reads as follows:

397 An annulable marriage can no longer be impugned when the cause of its annulability ceases to exist or when, in the event that the consent of the spouses or other persons who must consent to the marriage was not given or was vitiated, there has been express or tacit confirmation.

[22] This, section 397 of the Congolese Code allows for the ratification of a lack of consent. The IAD determined that this provision could apply to the authorization of a justice of the peace. The IAD chose this interpretation of Congolese law in the absence of any expert evidence to the contrary. Although it differs from that of the respondent, the IAD's interpretation of Congolese law does not appear unreasonable to me and, as I have previously noted, especially since the IAD and the parties at the hearing had agreed to a common-sense interpretation of the provisions of the Congolese Code. As for the validity of the marriage, given that this finding falls within a range of

possible, acceptable outcomes which are defensible in respect of the facts and law, the Court's intervention is not warranted.

2) Did the IAD err in determining that the applicant's relationship was genuine and was not entered into for the purpose of acquiring any privilege or status under the Act?

[23] The applicant submits that the IAD erred in finding that the marriage was in good faith. It had no valid reason to overturn the visa officer's decision, according to which the marriage was not genuine and that it had been entered into for the purpose of acquiring a status and for immigration purposes.

[24] The respondent, for his part, claims that the IAD made a finding of credibility based on his testimony, which it found to be trustworthy because he testified in a direct, spontaneous and sincere manner.

[25] Under section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the IRPR):

Bad faith	Mauvaise foi
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	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) was entered into primarily for the	a) visait principalement l'acquisition

purpose of acquiring any status or privilege under the Act; or
(b) is not genuine.

d'un statut ou d'un privilège
sous le régime de la Loi;
b) n'est pas authentique.

[26] In its decision, the IAD addresses most of the applicant's concerns and found the respondent's testimony credible. The IAD determined that there was evidence of ongoing communication between the respondent and his spouse from late 2002 or early 2003 to the present day and that this demonstrated a genuine relationship, notwithstanding the content of their conversations. The IAD concluded that the respondent's explanations for not having visited the DRC, for safety and financial reasons and because he had not thought that the immigration procedures would take so long, were reasonable.

[27] It is not for the Court to substitute its own finding for that of the panel, as long as the finding is well-reasoned, takes into consideration the essential evidence and falls within a range of acceptable outcomes which are defensible in respect of the facts and law. This decision belongs to that category. Therefore, the Court's intervention is not warranted.

CONCLUSION

[28] For these reasons, the application for judicial review is dismissed.

JUDGMENT

THE COURT ADJUDGES that this application for judicial review is dismissed.

“Danièle Tremblay-Lamer”

Judge

Certified true translation

Sebastian Desbarats, Translator

Annex A

Congolese Family Code

Article 351: [TRANSLATION] Each of the future spouses, even if one or both are minors, must personally consent to the marriage. However, whether marriage is solemnized in the presence of family or before a civil registrar, marriage by proxy may be authorized by a justice of the peace for a serious reason.

Article 370 (4): [TRANSLATION] The spouses may be represented by a proxy who has a signed power of attorney; the proxy shall be a close relative, unless there is a valid reason duly noted by the civil registrar.

Article 373 (3): [TRANSLATION] The civil registrar shall require the following documents to be submitted: ... 3. or, as the case may be, copies of the acts evidencing the consent of the parents or guardians, signed powers of attorney as provided by law.

Article 397 An annulable marriage can no longer be impugned when the cause of its annulability ceases to exist or when, in the event that the consent of the spouses or other persons who must consent to the marriage was not given or was vitiated, there has been express or tacit confirmation.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3983-10

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v. PLACIDE OLEMBO OYEMA

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