Federal Court  Cour fédérale

Date: 20111212

Docket: IMM-2236-11

Citation: 2011 FC 1456

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 12, 2011

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

SESEYSOTHEA KEO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is asking the Court to set aside a decision by the Immigration Appeal Division of the Immigration and Refugee Board (the panel), dismissing the appeal he filed under subsection 63(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act), against the refusal by a visa officer to grant his spouse's sponsored application for permanent residence.

[2] A brief review of the facts is necessary.

[3] The applicant is 31-year-old citizen of Cambodian origin. From 1997 to 2003, he was previously married to a Cambodian citizen, whom he sponsored to come to Canada, but the couple divorced one year after his first spouse obtained permanent residence. This is the first marriage for the applicant's second spouse, who is 26 years old.

[4] The applicant stated that he met his second spouse through his mother. The applicant's mother had known his future spouse's grandparents for some time, and she stated that she had met his future spouse in January 2005 while visiting Cambodia. But it was only in the summer of 2006 that the applicant made contact with his future spouse for the first time. After speaking over the phone, the couple exchanged photos. On September 11, 2006, the applicant travelled to Cambodia with his mother to meet his future spouse and celebrate their engagement.

[5] The two spouses were married in Cambodia on March 1, 2007. Their marriage is recognized by the authorities in Cambodia and several guests apparently attended it. Since then, the applicant, who owns a family-operated convenience store in Montréal, travelled to Cambodia in September 2008, October 2009 and October 2010. Several photos of the couple (including members of their families) during the marriage ceremony and in public places during other visits to Cambodia or abroad (Macau) were submitted before the panel, as well as proofs of purchase for plane tickets and calling cards, in particular.

[6] Credibility was at the heart of the exercise of the jurisdiction of the two specialized decision-making authorities ruling on the genuineness of the marital relationship and on the couple's true intentions.

[7] The visa officer rendered a negative decision on January 31, 2008, after interviewing the applicant's spouse. The visa officer identified a certain number of problems with respect to the knowledge the spouse's father had of the applicant's past situation. On June 10, 2010, and February 8, 2011, the applicant, his mother and his spouse testified during the *de novo* hearing before the panel (his spouse testified over the phone). In its decision dated February 25, 2011, dismissing the appeal, the panel relied on several contradictions in the testimonial evidence and documentary evidence (namely forms) to find that the marriage had not been entered into in good faith; hence this application for judicial review.

[8] Essentially, it was not established to the satisfaction of the visa officer and the panel that the spouses' marriage is genuine and was not entered into primarily for the purpose of acquiring any status or privilege under section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations). This is a question of mixed fact and law requiring the specialized expertise of the decision-maker (*Khera v Canada (Minister of Citizenship and Immigration)*, 2007 FC 632 at paragraph 7 (*Khera*)).

[9] In such a case, the Court's assessment would be limited to "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" in the knowledge that "[t]here might be more than one reasonable outcome": *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59; *Zheng v Canada (Minister of Citizenship and Immigration*), 2011 FC 432 at paragraph 18 (*Zheng*); *Bustamante v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1198 at paragraph 20.

[10] It should be noted that section 4 of the Regulations was amended between the date that the application of the applicant's spouse was refused by the visa officer and the date of the hearing before the panel. In January 2008, the provision read as follows:

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.

[Emphasis added.]

[11] As can be seen, section 4 of the Regulations refers to the following: 1) the genuineness of the relationship; and 2) the intentions of those involved. The case law has always considered the use of the word "and" ("*et*") to mean that those two elements must coexist to exclude the foreign national from the family class under subsection 12(1) of the Act: *Khan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1490 at paragraph 5; *Das v Canada (Minister of Citizenship and Immigration)*, 2009 FC 189 at paragraph 19; and *Paulino v Canada (Minister of*

Citizenship and Immigration), 2010 FC 542 at paragraph 19. Moreover, there is a close relationship between the two elements mentioned in section 4 of the Regulations in that the lack of genuineness of the marriage establishes a presumption that it was entered into primarily for the foreign national to acquire a status or privilege under the Act: *Sharma v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1131 at paragraphs 17-18; *Kaur v Canada (Minister of Citizenship and Immigration)*, 2010 FC 417 at paragraphs 15-16.

[12] In the current version, which has been in force since September 30, 2010, subsection 4(1) of the Regulations now bases the exclusion of a foreign national on a disjunctive test:

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 purpose of acquiring any status or privilege under the Act; **or**	*a*) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;
(*b*) is not genuine.	*b*) n'est pas authentique.
[Emphasis added.]	

[13] The amendment made to section 4 of the Regulations is not cosmetic in nature; the use of the word "or" in the English version and of the words "selon le cas" in the French version are very clear: if either of the two elements (genuineness of marriage and intention of the parties) is not met, the exclusion set out in the new subsection 4(1) of the Regulations applies.

[14] Regardless, the two parties agree that the analysis of the reasonability of the decision rendered by the panel must be carried out according to the former section 4 because the visa officer rendered his decision under the former version of this provision. In this case, the panel is not being criticized for failing to consider the two elements in section 4 of the Regulations, but rather for rendering an unreasonable decision as a whole.

[15] First, it is up to the person who makes an application for permanent residence in the family class, the sponsored spouse in this case, to prove that his or her marriage is recognized as genuine in the country where it occurred (subsection 16(1) of the Act). A marriage that is legally recognized according to the law of the place where it occurred is usually recognized in Canada. See the operational manual by Citizenship and Immigration Canada (CIC) entitled “OP 2—Processing Members of the Family Class” (manual).

[16] We sometimes talk about an “arranged marriage” to describe a number of situations that may vary infinitely from one country or culture to another. In cases where spouses are compelled to get married in the country of origin, we may ask ourselves whether, without consent from one of the spouses, such a marriage would be recognized in Canada, like bigamous and polygamous marriages, which are not legally recognized in our country. Here, the issue is instead a marriage where the future spouses did not know each other beforehand but wanted to get married in the female spouse’s country of origin after becoming acquainted through members of their respective families. The lawfulness of the marriage is not in question here, but rather its “genuineness” and the “intention” of the spouses.

[17] It should be recalled that the Act and Regulations do not provide a definition of “marriage” and that an arranged marriage or a common-law union are not problematic for the purposes of the application of section 4 of the Regulations as long as the couple are in a “conjugal” relationship, that is, a “genuine” relationship. However, “ . . . the Board must be careful not to apply expectations that are more in keeping with a western marriage. By its very nature, an arranged marriage, when viewed through a North American cultural lens, will appear non-genuine.”: *Gill v Canada (Minister of Citizenship and Immigration)*, 2010 FC 122 at paragraph 7 (*Gill*); *Abebe v Canada (Minister of Citizenship and Immigration)*, 2011 FC 341 at paragraph 34 (*Abebe*).

[18] A marriage might have been entered into in accordance with all of the statutory formalities, but, nonetheless, the visa officer or the panel may refuse to recognize its effects for the purposes of the application of the Act and Regulations if they find that the marriage did not occur in “good faith”, even if the expression “non-genuine marriage” is not used in their reasons for decision. See *Vézina v Canada (Citizenship and Immigration)*, 2011 FC 900 at paragraph 14 (*Vézina*). In fact, what the immigration laws do not recognize are situations where the two spouses are complicit to duplicity (a non-genuine marriage) and/or where the intention of the spouses or of one of the spouses is primarily to acquire a status or privilege (even if the other partner may benefit from it). In other jurisdictions, these unions are sometimes described as “sham” or “white” marriages, whereas in Canada, the manual uses the expression “marriage of convenience”.

[19] Consequently, whether this is a conventional marriage, an arranged marriage or another type of conjugal relationship, it is essential to find in the couple’s relationship a mutual commitment to

living together to the exclusion of any other conjugal relationship. The spouses' physical, emotional, financial and social interdependence goes hand in hand with this because, after all, in all cultures and traditions, over and above any religious undertakings, in terms of its civil effects, marriage is, above all, an indeterminate contract requiring that spouses help each other and contribute towards the expenses of the marriage in proportion to their respective means, which certainly includes the activities of each spouse, or even both together, in the home.

[20] Furthermore, in *M v H*, [1999] 2 SCR 3, at paragraph 59, the Supreme Court of Canada referred to the criteria in *Molodowich v Penttinen* (1980), 17 RFL (2d) 376 (Ont. Dist. Ct.) to include relationships that are "similar to marriage". It spoke of a conjugal relationship based on generally accepted characteristics: shared shelter, sexual and personal behaviour, services, social activities, economic support, children and the societal perception of the couple. However, these elements may be present in varying degrees and not all are necessary for the relationship to be found conjugal. The same type of criteria can be found in the manual.

[21] We can expect that the conjugal relationship of a legally married couple or a common-law couple would have the same type of characteristics. That being said, once the marriage has taken place abroad and one of the spouses has stayed in his or her country of origin to wait for the other spouse to sponsor him or her to come reside permanently in Canada, how does one convince the authorities that it was not a marriage of convenience?

[22] There is no single method of analysis. For example, money transfers, the combining of financial resources, the existence of joint accounts and the purchase of property in the name of both

spouses are certainly indicative of financial support or interdependence. Something else that can be verified is how the spouses behave towards one another and towards the authorities in their respective countries. Do they have children? Do they support each other during illnesses? Do they give each other gifts? Do they travel together? Do they live under the same roof when they are in the foreign spouse's country of origin? In what way and how often do they communicate when they are separated?

[23] Of course, credibility is an aspect central to an officer or panel's analysis of the genuineness of a relationship. The officer or panel is permitted to examine, in particular, the circumstances and the length of the relationship, as well as the marriage itself (location of the wedding, type of wedding, presence of guests). For example, was the marriage ceremony consistent with the beliefs and culture of the spouses? Aside from photos of the ceremony or of the spouses in public places, is there evidence that the spouses actually lived together at any point after their marriage and honeymoon?

[24] The jurisprudence confirms that there is no specific test or set of tests established for determining whether a marriage or relationship is genuine and that the relative weight to be given to each is exclusively up to the officer or panel (*Ouk v Canada (Minister of Citizenship and Immigration)*, 2007 FC 891 at paragraph 13; *Zheng*, above, at paragraph 23; *Khan*, above, at paragraph 20).

[25] For example, in *Khera*, above, the Court found that it was reasonable to assess the length of the spouses' relationship before 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, their language, their respective interests, their family ties in Canada and past attempts by the person sponsored to come to Canada.

[26] Similarly, the Court decided in *Zheng* that the panel could not be criticized for considering the circumstances surrounding how the spouses met, their marriage proposal or even the existence of a pull factor for the sponsored spouse to come to Canada despite the existence of material evidence (such as phone bills, written correspondence or money transfers between the spouses) that was, at first glance, favourable.

[27] Finally, the panel is presumed to have considered all of the evidence before it to render its decision (*Florea v Canada Canada (Minister of Citizenship and Immigration)*, [1993] FCJ 598 (FCA); *Lai v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at paragraph 90 (FCA)), and the mere fact of not mentioning all of the evidence is not sufficient to rebut the presumption (*GV v Canada (Minister of Citizenship and Immigration)*, 2011 FC 900 at paragraph 19; *Wiesehahan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 656 at paragraphs 45-46).

[28] In this case, the applicant submits today that the panel failed to analyze the evidence as a whole and that its analysis with respect to the good faith of the marriage is unreasonable such that there is reason to set aside his decision and return the matter for redetermination.

[29] First, the applicant claims that the impugned decision does not take into account relevant factors and that the panel placed excessive weight on trivial aspects of the spouses' relationship, such as when the applicant's mother met his future spouse for the first time, the dates and sequence of the conversations between the spouses and their respective families, and the number of photos or the frequency of calls the spouses exchanged before meeting.

[30] Second, the applicant criticizes the panel for failing to consider the fact that it was an arranged marriage and that the spouses' respective families had known each other for a long time. He submits that the panel adopted a North American logic and reasoning without taking into account the cultural context and practices in Cambodia in its assessment of the evidence.

[31] Third, the applicant criticizes the panel for drawing a negative inference from the fact that he had already been married and had sponsored his first wife, also from Cambodia, whom he divorced just one year after she obtained permanent residence in Canada. The applicant explains that his parents were unhappy with his first marriage, and that the panel should have found his explanation sufficient.

[32] This application for judicial review must be dismissed. The panel has sole jurisdiction over the facts; it is therefore important to read the panel's decision in its entirety to understand its essence and nuances. Even if another decision-maker may interpret the facts differently, the panel's finding that the applicant failed to discharge the burden of establishing, on a balance of probabilities, that his marriage to his new spouse is genuine and was not entered into primarily for the purpose of

acquiring any status or privilege under the Act falls within a range of “possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, above, at paragraph 47).

[33] The criticisms that the panel failed to consider all of the evidence and relied on irrelevant criteria to arrive at this finding are unjustified. It was open to the panel to place little weight on certain material elements (plane tickets, numerous photos, calling cards, etc.) given the credibility problems identified in the decision. Contrary to what the applicant submits, the panel did not engage in a microscopic analysis of the evidence. Instead, the problem was insufficient explanations provided with respect to aspects central to the exact circumstances of their meeting, the organization of their engagement and marriage, their cohabitation in Cambodia and the maintenance of their long-distance conjugal relationship.

[34] Except for mentioning a few specific details (the purchase of rings), the applicant, his mother and his spouse made no effort to explain to the panel how, according to Cambodian tradition, a marriage is “arranged”, whereas here the applicant was more than 30 years old, had already lived in Canada for several years, had already been married and was divorced. Therefore, the applicant cannot criticize the panel today for disregarding or ignoring the fact that it was an “arranged marriage”. However, in both *Abebe*, above, and *Gill*, above, the panel did not raise doubt as to the credibility of the appellants’ testimony, which makes it possible to differentiate these two matters from the case under consideration.

[35] The panel’s negative inferences are supported by the evidence in the record and its reasoning is not arbitrary or capricious under the circumstances.

[36] For example, the panel noted that the applicant's testimony that his mother met his future spouse during a trip to Cambodia in 2005 contradicts his statement in the sponsor's questionnaire that this first meeting had taken place on September 11, 2006, that is, at the engagement. The applicant explains that his mother might have met his future spouse at her grandparents' house during previous trips to Cambodia. Then why did the applicant's mother speak to him about the young woman only on March 3, 2006, one year later? It was reasonable for the panel to dismiss the explanation that the applicant had been recently divorced and had no intention of remarrying.

[37] What is more, in his testimony, the applicant stated that he had spoken with his future spouse for the first time over the phone on June 15, 2006. Yet, in the sponsor's questionnaire, he put August 18, 2006, as the date of their first meeting. The applicant now states that that date was when he had exchanged photos with his spouse. Moreover, the spouses' versions of the photos that were exchanged in August 2006 also present certain discrepancies. The applicant stated that he had sent five or six photos of himself in his convenience store whereas his spouse spoke instead of two photos that seemed to have been taken in a hotel. It should be noted that is it up to the spouses to ensure that the information in the forms is true, complete and accurate, especially since they had ample time to make any necessary changes to them.

[38] That is not all, however; the circumstances surrounding the marriage proposal are also nebulous. According to the form completed by the applicant's spouse, it was not the applicant's mother who spoke to her grandparents about marriage, as the applicant indicated in his testimony, but it was instead their respective parents who contacted each other by telephone in August 2006,

and it was only later that the spouses spoke over the phone. Yet the applicant stated that he had gotten in touch with his spouse on June 15, 2006. The panel was entitled to disbelieve the applicant when he suggested that this was a simple error.

[39] At what point the applicant's spouse, her parents and her grandparents learned of the applicant's divorce is also problematic, as are the circumstances surrounding the moment and circumstances of the applicant's meeting with his first spouse. Was it in 1995 or two years later, in 1997?

[40] In fact, the applicant's first wife's sponsored application for landing was initially refused, but the appeal of that refusal was allowed by the panel. Contrary to the applicant's past testimony at the first appeal that he had entered into a romantic relationship with his first spouse in 1995, during the hearing for this application, he testified that he had met his first spouse for the first time during a trip to Cambodia in July 1997 and that he had married her one week later, against his parents' wishes.

[41] The payment of the wedding rings exchanged by the future spouses also raised serious questions. According to the applicant, each spouse had purchased their own ring. However, his spouse stated that it was her mother who purchased the applicant's ring and the applicant's mother who purchased hers. When confronted with this, the applicant explained that his spouse had replied this way because, in Cambodian culture, each spouse's mother purchases the other spouse's ring. Subsequently, the applicant changed his testimony: he purchased the two rings because he wanted to show his spouse that he had the financial means to do so. Furthermore, contrary to his spouse's

statement, the applicant stated that his mother had accompanied the couple to the market to purchase the rings, but never indicated that his spouse's mother was also present. It was reasonably open to the panel to find that the credibility of the spouses was undermined.

[42] In addition, the panel also found it suspicious that the spouses celebrated their engagement less than a month after exchanging photos and were married nine months after the date they spoke over the phone for the first time. The very speed of the events that led to the marriage tends to demonstrate that the marriage was entered into for immigration purposes, a finding that can be drawn from the evidence in the record.

[43] Nevertheless, the panel considered the applicant's visits to Cambodia and seemed to recognize that the spouses spent time together in Cambodia and elsewhere. However, the panel did not believe that the spouses had lived together or that it was a genuine relationship, as it explained in its reasons. With respect to the calling cards, the panel found the evidence inconclusive in itself because it is impossible to verify when the calls were made and by whom.

[44] Thus, the panel doubted that the applicant had cohabitated with his spouse during his last trip to Cambodia, which lasted three months, even though he testified that he always stayed with his spouse during his visits there. In fact, the panel considered each spouse's lack of knowledge of the basic elements of daily life of the other is not consistent with the allegation that they lived together.

[45] For example, the applicant explained that his spouse took two vacation days during his three-month stay in Cambodia, whereas his spouse stated that she took ten. Furthermore, the

applicant's spouse believed that it was the applicant's brother who operated the convenience store in Montréal during his stay in Cambodia, whereas the applicant stated that it was his sister-in-law who operated it. On another occasion, the panel stated in its decision that, according to the applicant's spouse, the applicant had told her about his divorce during their first phone conversation in June 2006, whereas she told the immigration officer that she had learned about it when they exchanged photos in August 2006.

[46] The above-mentioned findings of fact are not unreasonable and the Court cannot intervene to substitute its own assessment of the evidence for that of the panel.

[47] For these reasons, this application for judicial review will be dismissed. No question of general important was proposed by the parties and none will be certified by the Court.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question is certified.

"Luc Martineau"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2236-11
STYLE OF CAUSE:	**SESEYSOTHEA KEO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
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