

Federal Court



Cour fédérale

Date: 20120515

Docket: IMM-4517-11

Citation: 2012 FC 587

Winnipeg, Manitoba, May 15, 2012

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

DUY HUYNH NGUYEN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Duy Huynh Nguyen seeks judicial review of a decision of the Immigration Appeal Division (the Board) which determined that Mr. Nguyen's wife, Sofiya Konovalova Nguyen, was excluded from membership in the family class because their marriage was not genuine or was entered into for the purpose of acquiring status or privileges under the *Immigration and Refugee Protection Act*, R.S.C. 1985, c. I-21 [*IRPA*].

[2] Mr. Nguyen argues that the Board erred by drawing an adverse inference from the failure of his wife to testify at the appeal hearing without properly considering whether her testimony was in fact required.

[3] For the reasons that follow, I am satisfied that the Board's decision was reasonable. As a result, the application for judicial review will be dismissed.

Background

[4] Mr. Nguyen is a twenty-eight year old Canadian citizen of Vietnamese descent. He resides with his mother and two brothers in Winnipeg, and worked part-time as a grocery clerk and full-time as an accounting assistant.

[5] Ms. Konovalova Nguyen is a twenty-three year old Russian citizen living in Moscow. She studies foreign languages and linguistics, specializing in Japanese and English, and has been learning Vietnamese since meeting Mr. Nguyen. She hopes to work as a foreign language teacher.

[6] The couple first met on March 27, 2009 through an on-line pen-pal site called "Interpals". They communicated on a near daily basis through Skype, telephone and e-mail.

[7] Shortly after they began corresponding, the couple began discussing the possibility of marriage. Mr. Nguyen suggested that Ms. Konovalova Nguyen contact his friend's wife, who was Uzbek but living in Canada. He also began researching foreign marriage requirements.

[8] On July 16, 2009, Mr. Nguyen traveled to Russia to meet Ms. Konovalova Nguyen in person. Three days later, he proposed, and the couple married one week later. Ms. Konovalova Nguyen's family was in attendance at the wedding but Mr. Nguyen's family was not.

[9] The paperwork for a marriage in Russia can take up to three months to obtain. However, Ms. Konovalova Nguyen had already made the necessary arrangements to register a marriage before Mr. Nguyen arrived in Moscow even though the two were not yet engaged.

[10] Mr. Nguyen has visited his wife on one occasion since the wedding. A second visit was cancelled due to difficulties in obtaining an entry visa to Russia for Mr. Nguyen.

[11] In November of 2009, Ms. Konovalova Nguyen applied for permanent residence in Canada as a member of the family class. However, an immigration officer refused the application, having determined that her marriage to Mr. Nguyen was not genuine and was entered into by her for the purpose of immigrating to Canada.

[12] The couple appealed the immigration officer's decision to the Board. Mr. Nguyen appeared at the hearing with counsel and testified in support of the appeal. Ms. Konovalova Nguyen did not testify at the hearing.

The Board's Decision

[13] The Board found Mr. Nguyen to be a credible witness and was satisfied that his intentions in entering into the marriage were sincere. However, the Board found on a balance of probabilities that

Ms. Konovalova Nguyen's marriage to Mr. Nguyen was not genuine, and was entered into by her for the purpose of acquiring status or privileges under *IRPA* as contemplated by section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2010-208 [Regulations].

[14] In coming to this conclusion, the Board reviewed the events leading up to the marriage, including the haste with which the marriage had taken place and the circumstances surrounding the wedding itself. The Board also had regard to Ms. Konovalova Nguyen's long-time desire to leave Russia, her personal history and her conduct after the marriage. The Board also considered the differences in the couple's cultural and religious backgrounds and in their financial and educational levels.

[15] The Board was also very troubled by the fact that Ms. Konovalova Nguyen had refused to testify at the hearing, noting repeatedly in its reasons that she was not present to address the Board's concerns surrounding the marriage. Mr. Nguyen had explained that his wife was angry with him over his inability to visit her in Russia, and that this is why she refused to testify at the IAD hearing. However, the Board drew an adverse inference from Ms. Konovalova Nguyen's refusal to testify and concluded that it indicated an indifference to the outcome of the appeal.

[16] The Board also did not accept Mr. Nguyen's claim that his wife had been discouraged from testifying after a negative experience with the immigration officer. The Board noted that this explanation was not borne out by the CAIPS notes.

[17] In light of the foregoing findings, the appeal was dismissed.

The Issue on the Application

[18] Mr. Nguyen argues that the Board erred by drawing an adverse inference from Ms. Konovalova Nguyen's failure to testify at the appeal hearing without properly considering whether her testimony was in fact required.

Analysis

[19] Subsection 4(1) of the Regulations provides that a foreign national shall not be considered a spouse of a person if the marriage (a) was entered into primarily for the purpose of acquiring any status or privilege under the Act or (b) is not genuine. The onus is on an applicant to prove that the relationship satisfies both prongs of the test: *Kaur v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 417, [2010] F.C.J. No. 482 (QL) at para. 15.

[20] Findings as to whether a relationship is genuine or was entered into for immigration purposes are factual determinations which are reviewable on the reasonableness standard: *Kaur*, above at para. 14.

[21] Mr. Nguyen relies on the Board's decision in *Mann v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 198 (QL) as having established a legal test that must be applied in order to determine whether it is appropriate to draw an adverse inference from the failure of the sponsored spouse to testify at an appeal before the Board.

[22] At paragraph 14 of the *Mann* decision, the Board observes that there may be cases where the testimony of the foreign spouse may be required to discharge the evidentiary burden. The Board further provides a non-exhaustive list of situations where it may “be advisable or even necessary to call the applicant as a witness”.

[23] These include circumstances where, for example, there are specific and significant inconsistencies in the record or where the foreign spouse has a questionable immigration history. Other such cases include situations where there is an obvious reason to question the motivation of the applicant or where there is little documentary evidence to corroborate the testimony of the appellant.

[24] The Board went on in *Mann* to observe that there may also be cases where the testimony of the foreign spouse may not be necessary, including cases where the Canadian spouse is able to persuasively address the concerns.

[25] Mr. Nguyen says that the Board erred in this case by failing to apply the *Mann* test in considering whether an adverse inference should be drawn from Ms. Konovalova Nguyen’s refusal to testify and in failing to consider whether her answers to the Board’s concerns were available from the record before it.

[26] I do not accept this argument.

[27] While the Board did not expressly reference the *Mann* decision, it clearly identified its concerns, many of which fit squarely within the examples cited by the Board in *Mann* as situations where the testimony of the foreign spouse may be required.

[28] Ms. Konovalova Nguyen had expressed a long-standing desire to leave Russia. She entered into a succession of relationships with men that she had met over the Internet. Mr. Nguyen was the first man who actually followed through on his promise to marry her, and the wedding took place within three months of the couple's first online contact and within days of their first in-person meeting. These circumstances provide an obvious reason to question Ms. Konovalova Nguyen's motivation in marrying Mr. Nguyen.

[29] The Board's concerns were amplified by the differences in the couple's cultural and religious backgrounds, their financial levels and their educational backgrounds. There was, moreover, evidence before the Board that Ms. Konovalova Nguyen continued to see a former boyfriend and go drinking with other men after her marriage.

[30] None of these findings have been challenged by Mr. Nguyen and they quite reasonably gave rise to concerns with respect to Ms. Konovalova Nguyen's intentions in marrying Mr. Nguyen and the genuineness of the marriage.

[31] Moreover, the Board's concern was not just Ms. Konovalova Nguyen's failure to testify, but her *refusal* to do so. The Board's finding that her refusal to testify suggested indifference on her part to the outcome of the appeal is one that was open to it on the record before it. It was entirely

reasonable for the Board to draw an adverse inference against Ms. Konovalova Nguyen in these circumstances.

[32] I would also note that the Board had a number of reasons for dismissing the appeal, quite apart from the adverse inference drawn from the failure of Ms. Konovalova Nguyen to testify. These were clearly explained in the Board's reasons and the decision has the justification, transparency and intelligibility required of a reasonable decision.

Conclusion

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

[34] Mr. Nguyen proposes the following question for certification:

Where a visa officer refuses an applicant for immigration based on *Immigration and Refugee Protection Regulations* 4(1) and the sponsoring spouse appeals to the Immigration Appeal Division of the Immigration and Refugee Board, does the Board commit a legal error by drawing an adverse inference from the absence of telephone testimony from the applicant for immigration without engaging in an analysis to determine whether the evidence of the appellant to the Board alone is sufficient?

[35] This is not an appropriate question for certification. The Board's concerns were not with Mr. Nguyen's evidence. It accepted that his intentions in entering into the marriage were sincere.

[36] The Board explained why it had concerns with respect to Ms. Konovalova Nguyen's intentions based upon the record before it, and I have concluded that those concerns were

reasonable. Consequently, the answer to the question would not be dispositive of this case and I decline to certify it.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed; and
2. No serious question of general importance is certified.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4517-11

STYLE OF CAUSE: DUY HUYNH NGUYEN v.
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: May 14, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** MACTAVISH J.

DATED: May 15, 2012

APPEARANCES:

David Matas

FOR THE APPLICANT

Alexander Menticoglou

FOR THE RESPONDENT

SOLICITORS OF RECORD:

DAVID MATAS
Barrister & Solicitor
Winnipeg, Manitoba

FOR THE APPLICANT

MYLES J. KIRVAN
Deputy Attorney General of Canada

FOR THE RESPONDENT