

Federal Court



Cour fédérale

Date: 20121128

Docket: IMM-9745-11

Citation: 2012 FC 1389

Ottawa, Ontario, November 28, 2012

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

HINA PATEL

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Hina Patel, age 33, was born in India, on the 31st of October 1980 and became a permanent resident here in December 2000 as a dependant child. She seeks, in this judicial review application, to set aside the December 13, 2011 decision of a member of the Immigration Appeal Division of the Immigration and Refugee Board of Canada (the Tribunal or IAD) dismissing her appeal from a Visa Officer's decision to refuse to issue a permanent resident visa to her husband, age 32, Mitulkumar

Mohambai Patel (the applicant before the IAD) finding he was a person described in subsection 4(1) of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) (*Regulations*) and of the opinion that their marriage was not genuine and was entered into primarily for the purposes of acquiring a status or privilege under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). Before the IAD Hina Patel was the appellant.

[2] Subsection 4(1) of the *Regulations* reads:

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

(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or

(b) is not genuine.

[Emphasis added]

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) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;

b) n'est pas authentique.

[Notre soulignement]

II. The Relevant Facts

[3] As noted, the Hina Patel, born in India, became landed in Canada in 2000 as a dependant child. She was 19 or 20 years old at the time and is now 31 years of age.

[4] In February 2004 she entered into a first marriage with a national of India and sponsored him for permanent residency in Canada.

[5] He was landed in September 2005 but they separated three months after his arrival. In her affidavit, Hina Patel says she threw him out of the house when she discovered he had a girlfriend. They separated. She was divorced from him on February 23, 2007. From February 2006 until May 2007 she had a steady boyfriend but the affair ended when she discovered he was married; when confronted she says her boyfriend, Manish Patel, promised to divorce his wife and marry her but he did nothing; that is when she “called off the affair” according to her affidavit.

[6] She states in her affidavit her ex-boyfriend kept “bothering” and telephoning her all during the summer of 2007; she says “I don’t know why but [I] agreed to meet him in August 2007”; he seduced her; she became pregnant.

[7] She travelled to India, she says to await for her boyfriend to marry her there as he had promised to divorce his wife. She states he broke his promise; she had an abortion in October 2007.

[8] She met her second husband in India in November 2007 through Mr. Patel’s aunt, marrying him there on January 26, 2008. It was his first marriage; it took place after a family meeting in December 2007 decided it should be so. She returned to Canada. She states in her affidavit she was in constant touch with her second husband by telephone. In July 2010 she says she returned to India and spent ten days with her husband. She says she spent three weeks in March 2011 with her husband, then again in November 2011.

[9] She sponsored her husband for permanent residency in Canada in January 2009. That application was refused by a visa officer on May 29, 2009 after interviewing Mr. Patel.

[10] Prior to that time however, in March 2009, Citizenship and Immigration Canada (CIC) received a poison pen letter alleging the Applicant had defrauded Canadian immigration authorities by charging \$20,000 cash for each former and current husband sponsorship.

III. The Tribunal's Decision

[11] The Tribunal stated the issue in this appeal is:

... whether section 4(1) of the *Immigration and Refugee Protection Regulations (IRPR)* applies, thereby excluding the applicant from consideration as a member of the family class. The test articulated in the IRPR is two-pronged, namely that a foreign national shall not be considered a spouse if the marriage is not genuine or was entered into primarily for the purpose of acquiring any status or privileges under the IRPA.

To succeed in this appeal, the appellant [Hina Patel before the IAD] has to demonstrate that the two prongs does [sic] not apply to the relationship.

[Emphasis added]

[12] It expressed its decision in the following manner:

The Tribunal heard the testimony of the appellant and the applicant and reviewed the evidence submitted on file. The Tribunal finds that the appellant has not established that section 4(1) does not apply to the relationship. The Tribunal is satisfied that the relationship is not of good faith and was entered into primarily for the purpose of acquiring a status or a privilege in Canada.

[13] The Tribunal recited most background facts described in paragraphs 3 to 8 of these reasons.

It noted that the Visa Officer raised the following concerns at the interview:

- i. Incompatibility with regard to marital backgrounds, the appellant [Hina Patel] being divorced.

- ii. A lack of efforts made by the applicant (Mr. Patel) and his family in order to do a thorough background check about the reasons behind the previous divorce of the appellant.
- iii. The absence of family members at the first meeting between the appellant and the applicant.
- iv. The lack of information the appellant has communicated to the applicant about life in Canada.
- v. The lack of evidence of cohabitation at the applicant's house.

[14] Under the heading entitled "Analysis" the Tribunal wrote:

The genuineness of a marriage can be affected by a number of different factors, which can vary from an appeal to another. They can include, but are not limited to such factors as:

- Compatibility;
- development of the relationship;
- communication between the appellant and the applicant;
- financial support;
- knowledge of each other;
- visits by the appellant to see the applicant;
- existence of a family of the applicant in Canada;
- birth child.

The second prong of the test – whether the relationship was entered into primarily for the purpose of acquiring any status or privilege under the IRPA – is self-evident and self-explanatory. The advantage sought in spousal appeal is generally the entry to Canada and the granting to the applicant of a permanent resident status as a member of the family class.

[Emphasis added]

[15] The Tribunal noted both Hina Patel and her husband testified at the hearing and that:

At the beginning of the first hearing on May 16, 2011, the Minister submitted a new document. This is a poison pen letter and the name of the author is redacted. The appellant's counsel objected to this evidence as it is unsworn evidence and the author is unidentified. The Tribunal decided to admit the evidence as it is considered to be pertinent. In fact, when the letter was disclosed to the appellant, she said that it would probably come from her ex-boyfriend who was

jealous and who was threatening her. She declared that she did not charge money for her husband's sponsorship as it is mentioned in the letter and she strongly denied it.

The Tribunal has reviewed the evidence on file and there is no information about the boyfriend mentioned by the appellant. The Tribunal also notes that the letter refers to the appellant abortion, which is also an information that is not appearing in the evidence. If it would not have been for the letter, the Tribunal strongly doubts that the appellant and the applicant would have disclosed the information. Considering that a pregnancy and previous relationships are very important elements in the analysis of the good faith of a relationship, the Tribunal admitted the document as evidence. As the appellant and the applicant confirmed some of the information it contains, the Tribunal will rely on their admissions of those elements. As for the contested information contained in the letter (charge of money and arranging marriage for immigration to Canada), the Tribunal is granting less weight to the letter.

[Emphasis added]

[16] The Tribunal analysed the relationship between her and her boyfriend Manish Patel in terms stated in paragraphs 5 to 7 of these reasons. The Tribunal wrote:

The story described by the appellant is very confusing and I find it to be not credible. Later in her testimony, she said that when she went to India, she first thought that it was to marry her boyfriend and that was only once in India that she found out that she had been tricked. However, she said that her relationship with him ended around May 2007 and she went to India in October 2007. If her relationship with her boyfriend ended in May 2007, the Tribunal does not understand that she expected him to marry her in Indian later on. This is an important contradiction without reasonable explanations provided by the appellant. Then, she said that she knew the purpose of going to India was to get married, but to no once in particular. She said that it is only once in India that she learned the existence of the applicant. On his side, the applicant said that his aunt knew the appellant's relatives who organized a meeting between the appellant and the applicant at his aunt's house.

[Emphasis added]

[17] The Tribunal further wrote, at paragraphs 16 and 17:

Both the appellant and the applicant mentioned that the appellant met several potential husbands before meeting the applicant, but her previous declaration suggests that she knew she was going to India in order to marry the applicant and that her boyfriend was not happy about that.

There are many contradictions in the declarations made by the appellant under oath. The Tribunal does not find her testimony to be credible as the circumstances of her personal situation preceding her meeting with the applicant are unclear and very confused. The Tribunal is of the opinion that she tried to hide that she had a relationship with a boyfriend and that she was pregnant, as it would have negatively impact (sic) on her sponsorship application. In fact, her declarations impact negatively on her case due to the fact that she tried to hide information and the fact that she was in a relationship with a boyfriend shortly before she get (sic) married with the applicant. This could have misled the Tribunal in assessing the good faith of the marriage.

[18] The Tribunal reviewed the applicant's (Mr. Patel) testimony both before it and before the Visa Officer. Before the Tribunal, he testified he knew about the abortion on the day of the engagement on January 3, 2008, but said "no" when asked at the May 2009 interview if the applicant (his wife) had ever been pregnant.

[19] According to the Tribunal the contradictory answers raised serious doubts about his testimony.

[20] The Tribunal then concluded the decision to get married happened in haste considering the context. Hina Patel had gone through a lot of important events in a short period of time and "she is suddenly willing to marry a person she barely knew". Both testified that they were allowed to meet and consent to get married by themselves but that the decision had also to be accepted by their

families after a meeting. Both testified that it was not a concern they first met without their family.

The Tribunal then wrote:

If there was no pressure or formal initial arrangement by the parents to conclude this wedding, as it is often the case in Indian arranged marriages, the Tribunal does not understand why it had to be done so fast. No reasonable explanations were provided. The Tribunal is more inclined to believe that the applicant had other intentions in getting married to the appellant than to enter into a genuine relationship and to live with the appellant.

[21] The Tribunal also made the following observation:

Furthermore, the Tribunal finds it surprising that the applicant accepted to marry the appellant in such a short period of time considering her relationship's background. He learned about the boyfriend and the abortion on January 3, 2008, and he took his decision the same day, accepting to marry her. The wedding took place on January 26, 2008, less than a month later.

[22] The Tribunal expressed the view that in both the occidental and the Indian culture "this situation is unusual". She made the following analysis:

- She arrived in India around October 16, 2007 thinking she would marry her boyfriend;
- She then learned she was pregnant from him and broke up with him;
- Got an abortion two weeks later around October 30, 2007;
- Hid the information about the abortion and the boyfriend until the engagement on January 3, 2008 and tells him everything; and
- He accepts right away to get married without taking any time to discuss with his family or think about it.

[23] The Tribunal then examined Hina Patel's first marriage; (1) their separation after three months, after he became a permanent resident, (2) the Tribunal did not find her explanation, her first

husband had a girlfriend and this is why she ended the relationship, credible. It noted Hina Patel remained in a relationship with her boyfriend for about a year knowing he was married. It found:

Her behaviour is not in accordance with her declarations, which leads the Tribunal to believe that her first marriage was a marriage of convenience in order to make her ex-husband access Canada. This has a negative impact on her appeal and on the weight to be given to her declarations at the hearing.

Given that context, the Tribunal has considered the evidence on file such as proof of communications and proof of money transfer. The Tribunal grants very little weight to those documents as proof of an authentic ongoing relationship. The Tribunal concedes that there were ongoing communications and money transfer between the appellant and the applicant, but the purpose of it is else. The Tribunal is of the opinion that this is self-serving evidence in order to lead the tribunal to believe that the relationship is of goof faith. Given the conclusion about the appellant and the applicant's credibility and intentions, the Tribunal grants very little weight to those documents as the Tribunal strongly believe (sic) that the primary intention of the applicant is to reach Canada through this relationship and the appellant contributed to attempt to reach this goal.

[Emphasis added]

IV. The Arguments

(a) From Hina Patel

[24] Counsel for Hina Patel raises two issues. First, he argues the Visa Officer breached Mr. Patel's procedural rights by not disclosing to him the poison pen letter. He argues the poison pen letter tainted his decision. He failed to confront Mr. Patel who was accused of trying to buy his way into Canada.

[25] Second, he submits the Tribunal based its decision on erroneous findings of fact; he argues the Tribunal failed to consider all of the evidence before it, making the decision an unreasonable one.

(b) From the Respondent

[26] Counsel for the respondent submits Hina Patel's case is simply based on her disagreement with the Tribunal's finding her burden of proof was not satisfied because the evidence submitted was not trustworthy. Counsel submitted the Tribunal weighed all of the evidence in coming to the decision it did. He submitted it is clear the Visa Officer did not rely on the poison pen letter.

[27] Counsel submits the question before me is whether the Tribunal made a reviewable error or its decision is unreasonable as to the facts.

V. Analysis and Conclusions

(a) Standard of Review

[28] It is settled law a breach of natural justice is reviewed on a standard of correctness while a review of errors in fact-finding is reviewed on the standard of reasonableness which is explained by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, para 47 as follows:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a

decision reasonable, referring both to the process of articulating the reasons and to outcomes. 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.

(b) Conclusions

[29] In my view this judicial review application must be allowed because the applicant's procedural rights were breached by the non-disclosure of the poison pen letter. That poison pen letter specifically refers to Hina Patel and accuses her of arranging false marriages and charging money for such arrangements. It accuses her of working illegally. It states she is attempting to blackmail the author, became pregnant and had an abortion. It names Mr. Patel as the person being sponsored.

[30] Counsel for the respondent argues the poison pen letter was not relied upon. Counsel for Hina Patel argues it is clear from the Computer Assisted Immigration Processing System (CAIPS) notes the Visa Officer relied on the poison pen letter when she asked Mr. Patel whether his wife was ever pregnant.

[31] Moreover, the Visa Officer did allude to the poison pen letter when she informed Mr. Patel "We have received information that your marriage to Hina is not genuine" to which Mr. Patel answered "No, it is true."

[32] In my view, fairness required Mr. Patel be confronted with the entire letter in order to provide him with a fair opportunity to react to it. It is clear from the reasons both the Tribunal's

decision and that of the Visa Officer that the contents of the poison pen letter had an impact on the decision, to the extent which can never be known. The poison pen letter should have been disclosed and handed over to the Royal Canadian Mounted Police (RMCP) for investigation.

JUDGMENT

THIS COURT'S JUDGMENT is that this judicial review application is granted. The Tribunal's decision is quashed and the applicant's sponsorship application is remitted for re-determination by a differently constituted tribunal. No certified question was proposed.

"François Lemieux"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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**REASONS FOR JUDGMENT
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