

Federal Court



Cour fédérale

**Date: 20130702**

**Docket: IMM-10891-12**

**Citation: 2013 FC 736**

**Ottawa, Ontario, July 2, 2013**

**PRESENT: The Honourable Mr. Justice Harrington**

**BETWEEN:**

**THACH SEREIBOTH**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] Ideally, husbands and wives should live together. However, the government has something to say about it when a Canadian marries a foreigner and wants to bring him or her home.

Mr. Sereiboth married his wife, Tran Thi Nguyet, a resident and citizen of Vietnam, more than five years ago. He has been unsuccessful in his efforts to sponsor her.

[2] First, a visa officer rejected Ms. Nguyet's application for permanent residence on the basis of s. 4 of the *Immigration and Refugee Protection Regulations*, which provides that a foreign national shall not be considered a spouse if the marriage was not genuine and entered into primarily for the purpose of acquiring status or privilege under the *Immigration and Refugee Protection Act* (IRPA).

[3] Mr. Sereiboth, as her husband and sponsor, was entitled to appeal that decision in accordance with s. 63(1) of IRPA. Following a review of the record, two face-to-face interviews with Mr. Sereiboth and a telephone interview with Ms. Nguyet, a member of the Immigration Appeal Division (IAD), of the Immigration and Refugee Board of Canada, dismissed the appeal. This is the judicial review thereof.

[4] It is one of the basic tenants of our rule of law that administrative decisions, which affect the lives and destinies of individuals, are subject to judicial scrutiny. Individuals must have a fair opportunity to make their case or their defence before an impartial decision maker. The issue in this judicial review is whether husband and wife were given a fair opportunity to make their case, and whether the attitude of the decision maker gave rise to a reasonable apprehension of bias.

[5] I am satisfied that this judicial review should be granted on both counts.

[6] Mr. Sereiboth has been in Canada for some 30 years. He was born Cambodian, but spent a few years in Vietnam as a refugee from the Khmer Rouge. He speaks Vietnamese.

[7] After his first marriage ended in divorce, by chance he ran into a former co-worker at a donut shop in Montreal. She said her sister in Vietnam was also divorced, and decided to play matchmaker.

[8] A telephone romance ensued, followed in reasonably quick succession by two visits to Vietnam. During the second visit, they were married.

[9] The visa officer who interviewed Ms. Nguyet in Vietnam was not satisfied (the burden being upon her) that the marriage was genuine and was entered into for a Canadian immigration advantage. He noted some inconsistencies between what was said at her interview and what had been written in her application forms. He also considered the fact that she had two sisters living in Canada, which constituted a "pull".

[10] Mr. Sereiboth's appeal is *de novo*.

[11] The member of the IAD had every right to question credibility given the apparent discrepancies between the written applications and the testimony of both husband and wife. There was definitely some confusion and misunderstanding. What is clear, however, is that husband and wife were not colluding to make up a story. She was interviewed some three months after he was first interviewed, yet there was still confusion.

[12] The member's legitimate concern soon deteriorated into frustration, sarcasm, snide remarks and the failure to at least try to understand ragged testimony through an interpreter. This was a fundamentally important time for husband and wife. They were entitled to respect. Credibility was

put in issue because it was written that they telephoned each other twice a week “at least”. In her decision, the member forgot to mention “at least” and to draw a distinction between telephone calls before marriage and after marriage.

[13] There was also confusion as to where she lived in the Vietnam. One mentioned a major city and the other a suburb or district thereof. This cannot lead to a lack of credibility, much less to a finding that this was a marriage of convenience.

[14] There was a great deal of confusion about the courtship in Vietnam. There seems to be a distinction between discussing marriage and a formal engagement. The formal engagement is also termed there as a “traditional marriage” which we might term here as a common law relationship. There is also a state recognized marriage which has two components: the date the papers are picked up from the registry office and the date of the actual ceremony. Husband and wife tried to explain, but the member would not listen. She said to the wife (page 366 of the Certified Tribunal Record):

BY PRESIDING MEMBER (to applicant)

Q. This is even better. So when did you actually get married?  
What’s the date of your marriage? Pick a date, please. Just one.

[15] The member could not believe that the couple did not discuss prior to marriage where they would live. Mr. Sereiboth simply assumed that his wife would join him in Canada. He also testified that if he is unable to sponsor her, once he earns a bit more money he will join her in Vietnam. The complete story was not considered, *i.e.* the decision was made without taking into account all of the evidence.

[16] There is some cultural insensitivity with respect to Mr. Sereiboth's assumption that his wife would join him in Canada. While two Canadians would undoubtedly have that discussion today, it should not be forgotten that only 50 years ago Peggy Marsh sang "I will follow him wherever he may go."

[17] While frustration may be understandable, sarcasm is not. Many remarks were made to the Minister's delegate putting the decision maker's impartiality into serious question. For example, in trying to sort out Mr. Sereiboth's use of a cell phone as opposed to a calling card, the Certified Tribunal Record reads at page 303:

BY PRESIDING MEMBER (to minister's counsel)

- No, the whole thing makes no sense, but I've given up.

[18] There was also criticism arising out of the fact that Mr. Sereiboth was still financially at risk for the sponsorship of his ex-in-laws. He did not share that fact with her. He considered that he was not at risk because they were not on welfare. One can understand the difference between current liability and potential liability.

[19] The couple was challenged with respect to the number of days they lived together in Vietnam following the wedding. Ms. Nguyet was challenged with respect to the statement she made in her application in that she had failed to mention that during that time he made a trip to Cambodia to visit his sick uncle. At page 326 of the Certified Tribunal Record it reads:

BY PRESIDING MEMBER (to minister's counsel)

- She forgot he left.

She explained she listed the beginning and end of their cohabitation together. She certainly was aware that her husband had made a trip to Cambodia to visit his uncle. That uncle had represented the family at the wedding.

[20] At page 329 of the Certified Tribunal Record, it was pointed out to Mr. Sereiboth that Ms. Nguyet's son is included in the sponsorship. He was asked how old he was. The answer was that he was born in 1991:

BY MINISTER'S COUNSEL (to appellant)

[...]

Q. No alimony. Now you have sponsored also her son. Her son is included in the sponsorship. How old is he? How old is he?

A. How old is he? He was born in '91.

Q. Yeah. How old is he?

A. (...)

Q. It makes him...

A. (Inaudible) and now.

BY PRESIDING MEMBER (to appellant)

Q. Why don't you know how old he is without calculating it?

BY MINISTER'S COUNSEL (to appellant)

Q. Yeah, like you don't...

BY PRESIDING MEMBER (to appellant)

- This is your wife's son, sir. Why do you have to calculate? You should know hold [sic] old he is, he's your stepson.

A. Twenty something.

[21] Age changes year by year. It was perfectly acceptable to state the year of birth. Although dealing more with judicial independence, rather than impartiality, Mr. Justice Le Dain stated in *Valente v The Queen*, [1985] 2 SCR 673, at page 685, [1985] SCJ No 77 (QL):

Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" as Howland C.J.O. noted, connotes absence of bias, actual or perceived.

[22] Mr. Justice Martineau thoroughly reviewed the law in *Guermache v Canada (Minister of Citizenship and Immigration)*, 2004 FC 870, 257 FTR 272, [2004] FCJ No 1058 (QL). The test was set out by Mr. Justice de Grandpré in *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369. He said at page 394:

The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

He added that the grounds of the apprehension must be substantial and not based on a "very sensitive or scrupulous conscience."

[23] For these reasons, the judicial review shall be granted.

**ORDER**

**FOR REASONS GIVEN;**

**THIS COURT ORDERS that**

1. The judicial review is granted.
2. The matter is referred back to another member of the Immigration Appeal Division of the Immigration and Refugee Board of Canada for re-determination.
3. There is no serious question of general importance to certify.

“Sean Harrington”

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-10891-12

**STYLE OF CAUSE:** THACH SEREIBOTH v MCI

**PLACE OF HEARING:** MONTREAL, QUEBEC

**DATE OF HEARING:** JUNE 27, 2013

**REASONS FOR ORDER  
AND ORDER:** HARRINGTON J.

**DATED:** JULY 2, 2013

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