Federal Court  Cour fédérale

Date: 20160915

Docket: IMM-1395-16

Citation: 2016 FC 1045

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 15, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

LORAINE FOURNIER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, Loraine Fournier, is applying for judicial review of the decision rendered by the Immigration Appeal Division (IAD), which constitutes a panel of three members. The only question at hand is whether the marriage entered into between the applicant and Mohamed Aakki satisfies Canadian legislation with regard to immigration law. The application

for judicial review is made under section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA].

I. The Act

[2] The applicant, who is a Canadian citizen, wishes to sponsor the application for permanent residence made by Mr. Aakki, her husband. He is a citizen and resident of Morocco. Subsection 12(1) of the IRPA stipulates that family reunification is desired. The text reads as follows:

Family reunification	**Regroupement familial**
12 (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	12 (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.

The *Immigration and Refugee Protection Regulations*, (SOR/2002-227) (the Regulations) explicitly set out the types of relationships that do not satisfy the legislation in terms of what is considered a legitimate marriage for immigration purposes. Subsection 4(1) of the Regulations reads as follows:

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	4 (1) Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de

or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership	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.

The only question to be answered in this case is whether the IAD committed an error eligible for judicial review.

[3] In this case, the permanent resident visa application made in Morocco was denied by an immigration officer. This decision may be appealed, as set out in subsection 63(1) of the IRPA:

Right to appeal — visa refusal of family class	**Droit d'appel : visa**
63 (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.	63 (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

[4] Here, the immigration officer refused to issue the visa and two of the three members of the IAD panel dismissed the appeal filed by Ms. Fournier. Hence the application for judicial review before this Court—not of the immigration officer's decision, but of the majority decision rendered by the IAD.

II. The facts

[5] The applicant and Mr. Aakki communicated for the first time via an Internet site on October 2, 2010. Their exchanges continued throughout the months that followed, some of them occurring via Skype video chats. These exchanges were numerous and frequent. A good rapport—starting with friendship —quickly developed between them, until Mr. Aakki proposed to the applicant on February 27, 2011. They had never met. The applicant went to visit the man who would become her spouse, for a period of 13 days in July 2011. She arrived on July 11, 2011, and they had a modest wedding before a Moroccan court of law on July 22. The applicant's family was not present, and the only members of Mr. Aakki's family present were his two sisters and his parents. As it was, it seems that Mr. Aakki's father did not wish to be photographed on the wedding day.

[6] In any case, the applicant returned to Canada the day after the wedding and she did not return to Morocco until July 2012. In the meantime, Mr. Aakki applied for permanent residence in Canada. He appeared for an interview on April 11, 2012, and the interview lasted 53 minutes. That same day, a decision letter was sent to him. The decision to deny him a permanent resident visa came swiftly, and was appealed to the IAD just as quickly, on April 24, 2012.

[7] In the summer of 2012, from July 1–10, the applicant returned to Morocco so that a religious wedding could take place in the Muslim tradition. She did not return to Morocco in 2013 and instead spent nearly two weeks there in 2014 (from August 3–16, 2014) and three weeks in 2015 (July 7–August 1, 2015).

[8] The hearing before the IAD took place on November 26, 2015; the majority decision was dated January 26, 2016, and that of the dissenting opinion came three weeks later, on February 15, 2016.

III. Decision

[9] At the hearing before the IAD, Mr. Aakki testified by telephone. It seems that his counsel had chosen to procure international calling cards that ran out, one after another, during the hearing, such that the hearing was allegedly interrupted several times. Mr. Aakki was also assisted by an interpreter.

[10] Having noted that the applicant must satisfy the two criteria in subsection 4(1) of the Regulations, which is to say that the applicant must show not only that the marriage is genuine, but also that it did not serve mainly to acquire a status under the *Immigration and Refugee Protection Act* when it was entered into, the IAD indicated that a number of factors must be taken into account, on a case-by-case basis, to determine whether the marriage is genuine. Elements to be examined include the spouses' compatibility, the development of the relationship between them, communications they had, financial support, their knowledge of each other, and visits that may have taken place. For the majority members, the main reason for having entered into the marriage is clear and self-explanatory. One of the partners wants to enter Canada and become a permanent resident there (as a member of the family class).

[11] They noted the significant age difference between the spouses (12 years). It is also noted that the applicant has children who are currently 16 and 19 years old, whereas Mr. Aakki has allegedly never been married before and has no children.

[12] In the end, the majority members reviewed the various elements that are generally weighed in attempting to establish the authenticity of a marriage and they declared themselves to be quite unconvinced of Mr. Aakki's credibility. Thus, paragraph 16 of the decision reads:

> [16] Furthermore, the panel is not at all satisfied that the applicant is in this relationship in good faith, basically for the same reasons as the visa officer, but also because of his testimony that it had the benefit of hearing, which it found vague and contradictory in certain respects. [...] The appellant's counsel also had to warn him, at another time, reminding him to cooperate by answering the questions more directly. In spite of this warning, the applicant continued to give vague and nebulous answers on important aspects of his relationship, and he continued not to answer directly to certain questions. Some examples will follow.

[13] The majority members expressed quite a number of concerns, ranging from the spouses' compatibility and their knowledge of one another to their plans for the future, including their plans regarding starting a family. Moreover, these majority members had some difficulties reconciling the applicant's religious beliefs, but also those of his family.

[14] The minority member came to a completely different conclusion. It is worth pausing to consider a preliminary issue raised by the minority member. The member seemed to blame some of the difficulties encountered during Mr. Aakki's telephone testimony on inadequate interpretation and connections. Although some might think that a request to repeat the question might be used as a tactic to better manage an interrogation, the dissenting member instead held

that "it was evident from his testimony that he was unable to fully grasp many of the questions asked in French that were not interpreted." (paragraph 4)

[15] This claim is not consistent with the weight that the dissenting member chose to give to Mr. Aakki's very detailed statement under oath. Indeed, this statement, which is several pages long, is in impeccable French and is very well articulated. The dissenting member clearly admits to having granted considerable weight to this statement (paragraph 11), even though he noted that Mr. Aakki's testimony was marked by the frequent inability to understand simple questions posed in French. It is worth recalling that the applicant and Mr. Aakki had maintained a relationship for several years, exclusively in French, through video, written and telephone communication. Furthermore, Mr. Aakki was interviewed for 53 minutes, in French, without it even being suggested that his otherwise vague and non-credible answers might have resulted from a lack of understanding of the questions posed.

[16] In any case, the dissenting member rendered a very different judgment from those of the immigration officer and the two majority members. He held that the marriage is genuine and that it was not entered into for the purposes of gaining an advantage for immigration purposes.

IV. Analysis

[17] The applicant, through her legal counsel, emphasized the interpretation and translation challenges. Without ever stating what standard should have been met, the applicant complained of interruptions at the hearing that were allegedly caused by her counsel, since he was the one

who had chosen to use calling cards that ran out sooner than he would have liked. One can certainly think that these challenges impeded the flow of the discussion.

[18] According to the applicant, the quality of Mr. Aakki's testimony, which was cited by the majority members, was allegedly the result of this communication difficulty.

[19] The first question that must be answered is whether the majority decision is reasonable. The standard of review in such matters is not at issue. The case law of our Court is consistent in deeming that the merit of the IAD's decision is subject to the reasonableness standard of review (*Koffi v. Canada (Citizenship and Immigration)*, 2014 FC 7; *Taiwo v. Canada (Citizenship and Immigration)*, 2013 FC 731; *Canada (Citizenship and Immigration) v. Sloan*, 2014 FC 31; *Sivapatham v. Canada (Citizenship and Immigration)*, 2016 FC 721; *Hayter v. Canada (Citizenship and Immigration)*, 2016 FC 762).

[20] In no way did the applicant attempt to, much less succeed in, demonstrating the unreasonable nature of the decision rendered by the majority members, who stated that they were in agreement with the conclusions originally drawn by the immigration officer. Clinging to a minority position is not sufficient, in itself, to demonstrate that the majority position is unreasonable. In fact, at best, all the existence of a majority position in this matter does is enshrine the evolution of the case law in recent years, which establishes that it is possible for there to be more than one reasonable outcome. As has so often been reiterated, all the reviewing judge does is determine whether the decision rendered is within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. The reviewing judge must not

choose what he or she would have preferred as an outcome. Parliament has ruled that, on matters of merit, the decision rests with the administrative tribunal.

[21] In this case, the majority members' position satisfies the reasonableness standard (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paragraph 47).

[22] The applicant prefers the minority decision. Very well. But that is not the issue. What must be demonstrated is that the majority members' decision is unreasonable. This demonstration was not made. In my view, the position adopted is perfectly reasonable. The circumstances that led to this marriage are nebulous. It is not the Court's job to search the hearts and minds. The Court simply applies the law to the evidence as it is presented. The law requires that a solemn review be made of the circumstances, in order to determine whether the evidence as presented is sufficient to establish that the marriage is genuine and that it was not entered into for the purposes of acquiring any status or privilege under the Act. It is up to the applicant to demonstrate this. The existence of a dissenting opinion does not, in itself, demonstrate that the majority members rendered an unreasonable decision. It does, however, show a different point of view that could lead to the demonstration that the majority members rendered a decision that is outside the bounds of reasonableness. But to do this, the minority decision must have the power to show that the majority decision is not within a range of possible, acceptable outcomes and that it is not justified, transparent and intelligible.

[23] The applicant used the quality of the hearing as her main point of contention, since, in her opinion, it could be the reason behind Mr. Aakki's testimony being deemed vague and unclear. As I noted above, it was at the very least contradictory for the applicant to try to justify the testimony's poor quality using an argument of difficulties understanding French.

[24] First of all, the main point used to justify the authenticity of the marriage was the extensive and frequent communications between the spouses, leading first to marriage and then—for a period of four years—to a long-distance relationship without living together. It must be assumed that Mr. Aakki could speak French well enough to communicate with the applicant. Furthermore, he submitted an affidavit in impeccable French with very articulate remarks, an affidavit which, by the way, had a considerable effect on the dissenting member. And now it is being claimed that he could not understand simple questions. The explanation of the vague testimony before the IAD results from a perception of the testimony that is in no way consistent with the majority perception; neither is it consistent with the experience had by the visa officer in Morocco or with the type of relationship that Mr. Aakki maintained with Ms. Fournier. The complaint of the majority is with regard to the testimony's content, which was viewed as being vague, unclear and contradictory in some respects. Unless these observations are unreasonable, the Court must note and accept them. The majority members cite numerous examples that are reflected in the transcript of the hearing.

[25] It was noted that no interpreter was required during Mr. Aakki's interview with the immigration officer. If there were difficulties during the hearing, they were caused by the witness, to the point that the applicant's counsel had to intervene to solicit better cooperation from the witness. There is no cause to intervene in the name of reasonableness.

[26] The applicant has not indicated which principle of procedural fairness has allegedly been violated in this case. It seems that she is complaining that the insufficient participation at the hearing was due to the translation. Thus, this issue is raised for two reasons: to explain the

performance at the hearing and to allege a breach of procedural fairness. No case law was presented to establish the standard sought, whereas the case law states that the duty of fairness is flexible and variable (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817). Obviously, someone who does not understand the proceedings because he or she does not speak the language would not be able to participate. This lack of participation would violate procedural fairness. Hence, the *Immigration Appeal Division Rules*, SOR/2002-230 expressly provide for the services of an interpreter (section 18). Mr. Aakki speaks French. He has proven this. So then, what level of comprehension is necessary to satisfy the duty of fairness?

[27] An interpreter must offer continuous, precise, impartial and contemporaneous interpretation (*Lamme v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1336), as this also seems to be the standard required to satisfy section 14 of the *Canadian Charter of Rights and Freedoms*, part I of the *Constitution Act, 1982*, which constitutes Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (*R. v. Tran*, [1994] 2 SCR 951). Here, the right to the services of an interpreter was not denied. Quite the contrary.

[28] It was never clear exactly what the applicant's argument was with regard to interpretation. On the one hand, the interpretation was claimed to be lacking. Yet, when reading the transcript, one can see that the translation was most difficult at times when the witness spoke too fast or when several people were speaking at the same time. Each time, the chairperson of the panel had the individuals repeat themselves for clarity. On the other hand, it was claimed that the quality of French the witness used when speaking in that language affected his credibility. If this

were true, which was not demonstrated to be the case, this second argument would not be a matter of procedural fairness unless the witness had been forced to use this language. The applicant's counsel had alleged that such was the case, but had to withdraw this claim at the hearing because the evidence was to the contrary: the chairperson intervened to point out that the witness could use his mother tongue.

[29] I have read the transcript of the hearing before the IAD. I am far from convinced that the hearing was flawed. The witness chose to speak in French during the hearing. At times, he chose not to use the services of an interpreter, as was his prerogative. Given that he exercised his prerogative, I fail to see how he can make a valid complaint now. In any case, as Mr. Justice de Montigny wrote as part of our Court:

> [...C]omplaints about the quality of interpretation must be made at the first opportunity (*Mohammadian v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 FCR 371, [2000] FCJ No 309 (QL) [*Mohammadian*], at paragraph 27). By choosing to abstain, the applicant is therefore presumed to have waived his right to object to the quality of the interpretation through judicial review.(*Bal v. Canada (Citizenship and Immigration)*, 2008 FC 1178, [2008] FCJ No 1460 (QL), at paragraph 31).

I cannot detect any pressure that might have been put on the witness to speak in French, a language of which he seemed to have a good mastery. Not only did the witness not complain, but he chose to speak in French.

[30] In my view, the communication difficulties in no way violated procedural fairness. The majority decision is also reasonable. It is not necessary to qualify the dissenting decision. It may also fall within a range of possible, acceptable outcomes which are defensible in respect of the

facts and the law. Dissenting opinions are common in our law. This does not make minority or majority decisions irrational. I admit nonetheless some surprise in reading that the minority member found that the witness' testimony "was clear and consistent, that it corroborated the appellant's testimony and that it was, more likely than not, credible" (paragraph 11). His legal counsel even had to intervene at the hearing to get him to cooperate. Even the applicant did not go this far, choosing instead to explain the witness' vague and unclear testimony as resulting from a limited knowledge of French.

[31] Consequently, the application for judicial review must be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. The parties have not submitted any serious question of general importance for certification. In my opinion, no such question is raised.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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