Federal Court  Cour fédérale

**Date: 20190918**

**Docket: IMM-4470-18**

**Citation: 2019 FC 1187**

**Ottawa, Ontario, September 18, 2019**

**PRESENT: Mr. Justice Norris**

**BETWEEN:**

**MARSEL IDRIZI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. OVERVIEW

[1] The applicant, Marsel Idrizi, is a twenty-eight year old citizen of Albania. After arriving in Canada in January 2012, he made a claim for refugee protection. This claim was rejected in March 2014 but Mr. Idrizi remained in Canada on a series of work permits.

[2] In June 2016, Mr. Idrizi married Valbona Ruko in Vaughan, Ontario. Ms. Ruko, who is also a twenty-eight year old citizen of Albania, had become a permanent resident of Canada about six months earlier.

[3] In August 2016, Ms. Ruko applied to sponsor Mr. Idrizi for permanent residence as a member of the spouse or common law partner living in Canada class. At the time of the application, Ms. Ruko was pregnant. She gave birth to a daughter in February 2017. There is no suggestion that Mr. Idrizi is not the father.

[4] In a decision dated August 27, 2018, an officer with Immigration, Refugees and Citizenship Canada [IRCC] refused the application for permanent residence because Mr. Idrizi and Ms. Ruko failed to establish that they had not entered into their marriage primarily for the purpose of acquiring any status or privilege under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and that their marriage is genuine.

[5] Mr. Idrizi now applies for judicial review of this decision under section 72(1) of the *IRPA*.

[6] For the reasons that follow, I have concluded that the officer's decision is unreasonable. The application for judicial review will, therefore, be allowed and the matter will be remitted to another officer for redetermination.

## II. BACKGROUND

[7] Mr. Idrizi was born in Albania in February 1991. He arrived in Canada on January 20, 2012. The next day he made a claim for refugee protection on the basis that, as a gay man, he feared persecution in Albania. For reasons released on March 25, 2014, the Refugee Protection Division of the Immigration and Refugee Board of Canada determined that Mr. Idrizi is neither a Convention refugee nor a person in need of protection. An application for judicial review of this decision was dismissed by Justice Tremblay-Lamer on May 15, 2015 (Court File No. IMM-2793-14).

[8] According to Mr. Idrizi and Ms. Ruko, the two first met at a party in January 2015. At first they were just friends but by June 2015 they had become romantically involved.

[9] Ms. Ruko had also sought refugee protection in Canada on the basis of sexual orientation. She claimed that, as a lesbian, she feared persecution in Albania. Her claim, however, was accepted. She became a permanent resident of Canada on December 7, 2015.

[10] Mr. Idrizi and Ms. Ruko state that they decided to live together. They rented an apartment in Etobicoke beginning March 1, 2016. Both of their names were on the lease. They were married in June 2016. About 100 guests attended the wedding. Mr. Idrizi and Ms. Ruko went to Montreal, Mont-Tremblant and Niagara Falls for their honeymoon. A short time later, Ms. Ruko learned that she was pregnant. She gave birth to a daughter in February 2017. Both Ms. Ruko and Mr. Idrizi are named as the parents on the Statement of Live Birth form.

[11] The application for permanent residence for Mr. Idrizi was submitted in August 2016. When it was reviewed, an officer (not the one who made the decision) determined that, given the grounds that had been advanced in the refugee claims – Mr. Idrizi is gay, Ms. Ruko is a lesbian – further investigation of their relationship was required.

[12] By email sent on July 24, 2018, Mr. Idrizi and Ms. Ruko were called in for an interview on August 8, 2018. The decision rejecting the application was made a short time later.

## III. DECISION UNDER REVIEW

[13] Section 124 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] provides that a foreign national is a member of the spouse or common-law partner in Canada class if they:

(a) are the spouse or common-law partner of a sponsor and cohabit with their spouse in Canada;

(b) have temporary resident status in Canada; and

(c) are the subject of a sponsorship application.

[14] Only paragraph 124(a) of the *IRPR* is in issue here.

[15] Further, section 4(1) of the *IRPR* provides as follows:

| **Bad faith** | **Mauvaise foi** |
|---|---|
| 4 (1) For the purposes of these Regulations, a foreign national | 4 (1) Pour l'application du présent règlement, l'étranger |

| | |
|---|---|
| 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 | 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. |
| […] | […] |

[16] At the interview on August 8, 2018, the officer drew section 4(1) of the *IRPR* to the attention of Mr. Idrizi and Ms. Ruko. The officer then questioned them separately and, later on, together about a number of things including daily routines, things that had happened the day before the interview and the morning of the interview, how often the other person was in contact with his/her parents or other family and whether Mr. Idrizi had met Ms. Ruko’s parents. While many of their answers were in accord, the officer noted several discrepancies that were then put to Mr. Idrizi and to Ms. Ruko for comment.

[17] Eight of these discrepancies were noted specifically in the officer’s decision:

(a) Ms. Ruko’s driver’s licence showed the Etobicoke address where the couple said they both had lived since March 2016 but Mr. Idrizi’s driver’s licence (which had been issued in April 2017) showed an address in Waterloo, Ontario. Mr. Idrizi presented the officer with a change of address form dated July 26, 2018, changing the address on his driver’s licence to the Etobicoke address. He explained that he had used a false address for his

driver's licence so that he could get a better rate on his car insurance. Insurance documents provided by Mr. Idrizi indicated that the Waterloo address was used for his car insurance. However, the documents also indicated that Mr. Idrizi had been paying for home insurance for the Waterloo address since at least August 2017. (On the other hand, many other documents showed the Etobicoke apartment as his home address.)

(b) Mr. Idrizi said he would usually get home from work around 7:00 to 7:30 p.m. Ms. Ruko said he would usually get home around 5:00 to 6:00 p.m.

(c) Mr. Idrizi said he had arrived home the night before at around 6:00 p.m. Ms. Ruko said he had come home at 7:30 p.m.

(d) Mr. Idrizi said Ms. Ruko only has contact with her mother. Ms. Ruko said she is in contact with both her parents over Skype.

(e) Mr. Idrizi said Ms. Ruko's parents have not come to Canada. Ms. Ruko said they had.

(f) Mr. Idrizi said he had not met Ms. Ruko's parents. Ms. Ruko said that her mother had been in Canada from February 2017 until the end of July 2017 (for the birth of the baby) and that both her parents had come from December 2017 until June 2018. Mr. Idrizi had met them when they were visiting.

(g) Mr. Idrizi said he only has contact with his mother and not with his father. Ms. Ruko said he communicates with his family on Skype and Facebook and that his father calls him from time to time (something Mr. Idrizi later acknowledged but then added that he and his father do not get along).

(h) Mr. Idrizi said he and Ms. Ruko had last seen Ms. Ruko's Uncle Hasbee when he came to visit them at their house the previous Wednesday. Ms. Ruko said they had last seen him at their house the previous Saturday. When this discrepancy was pointed out to Mr. Idrizi, he agreed with Ms. Ruko.

[18] The officer noted that Mr. Idrizi and Ms. Ruko had "provided a variety of documentation and information to support their cohabitation and relationship, including a birth certificate for a child for which [*sic*] they are both listed as a parent." (While not mentioned in the decision, there is no dispute that the child was at the interview with her parents.) The officer found, however, that this information did not outweigh the information presented at the interview. The officer added: "The existence of a child is not determinative of a positive decision as it is essential that the PA [Principal Applicant – Mr. Idrizi] and SPR [Sponsor – Ms. Ruko] meet the requirements of the class."

[19] The officer concluded as follows:

> After reviewing all the evidence provided, on a balance of probabilities, I am not satisfied that the PA and SPR are in a genuine spousal relationship and not one entered into primarily for the purpose of acquiring any status or privilege under the Act. I come to this conclusion based on an overall assessment of the documentary evidence, and the information provided by the PA and SPR during their interviews.

[20] Since Mr. Idrizi was therefore not considered a spouse under section 4(1) of the *IRPR*, he was excluded from the spouse or common law partner in Canada class as defined by paragraph 124(a) of the *IRPR*. The application for permanent residence was refused as a result.

## IV. STANDARD OF REVIEW

[21] It is well-established that decisions on applications for permanent residence under the spouse or common law partner living in Canada class are reviewed on a reasonableness standard. Whether a marriage was entered into primarily for the purpose of immigration or is genuine is a highly factual inquiry and decision-makers are entitled to deference from reviewing courts. This is particularly the case when the decision-maker has the benefit of having questioned the spouses in person: see *Kim v Canada (Citizenship and Immigration)*, 2016 FC 1141 at para 9; *Ma v Canada (Citizenship and Immigration)*, 2016 FC 1283 at para 7; *Pabla v Canada (Citizenship and Immigration)*, 2018 FC 1141 at paras 11-13; *Wong v Canada (Citizenship and Immigration)*, 2019 FC 1017 at para 13; and *Basanti v Canada (Citizenship and Immigration)*, 2019 FC 1068 at para 13.

[22] Reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]). These criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). The reviewing court

should intervene only if these criteria are not met. It is not the role of the reviewing court to reweigh the evidence or to substitute its opinion for that of the original decision-maker (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

[23] In written submissions in support of the application for judicial review, Mr. Idrizi also contended that the officer breached the requirements of procedural fairness by failing to put the discrepancies which grounded the decision to him or to Ms. Ruko. A review of the record demonstrates that the concerns were fairly put to them. The issue of procedural fairness was not pressed at the hearing of this matter and, in view of the outcome, there is no need to consider it further.

## V. ANALYSIS

[24] The officer found that Mr. Idrizi was disqualified from the spouse or common law partner living in Canada class under section 4(1) of the *IRPR*. Specifically, the officer was not satisfied that Mr. Idrizi and Ms. Ruko "are in a genuine spousal relationship and not one entered into primarily for the purpose of acquiring any status or privilege under the Act." This conclusion, the officer explained, was "based on an overall assessment of the documentary evidence, and the information provided by the PA and SPR during their interviews."

[25] As has been discussed elsewhere (see, for example, *Singh v Canada (Citizenship and Immigration)*, [2015] 3 FCR 414, 2014 FC 1077 [*Singh*]), the current version of section 4(1) of the *IRPR* came into force on September 30, 2010 (SOR/2010-208, s 1). The version it replaced 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. |

[26] For present purposes, the material change in the provision is that what had been a conjunctive test for disqualification is now a disjunctive test. Previously, to disqualify spousal status under this provision, a decision-maker had to determine both that the marriage was not genuine and that it was entered into primarily for an immigration purpose. The two elements are closely connected so it is not surprising that a rebuttable presumption that a non-genuine marriage was entered into primarily for an immigration purpose emerged under the previous version (see the discussion in *Keo v Canada (Citizenship and Immigration)*, 2011 FC 1456 at para 11). Conversely, however, the previous version of section 4(1) would not disqualify a marriage that had been entered into primarily for an immigration purpose but which had later grown into a genuine relationship (see *Khera v Canada (Citizenship and Immigration)*, 2007 FC 632 at para 6). By making the test disjunctive, the amended provision was intended to make the decision to disqualify spousal status more straightforward: see the Regulatory Impact Analysis Statement re SOR/2010-208 (September 30, 2010), *Canada Gazette Part II, Vol 144, No 21*, pp 1942-46 [Regulatory Impact Analysis].

[27] Since either element of section 4(1) of the *IRPR* will now suffice to disqualify spousal status, it can be more difficult for a spouse to establish that he or she is not disqualified. This is because he or she must demonstrate both that the marriage was not entered into primarily for an immigration purpose and that the relationship is genuine (*Ferraro v Canada (Citizenship and Immigration)*, 2018 FC 22 at para 12 [*Ferraro*]).

[28] Under both the previous and the current versions of section 4(1) of the *IRPR*, the primary purpose test and the genuineness test are determined with respect to different time-frames. The relevant time for the primary purpose test is in the past (i.e. the time of the marriage); the relevant time for the genuineness test is the present (i.e. the time of the decision) (*Singh* at para 20; *Ferraro* at para 13; Regulatory Impact Analysis at 1944).

[29] It is noteworthy that when section 4(1) of the *IRPR* was amended the expectation was that, in most cases, officers will focus on the primary purpose test (Regulatory Impact Analysis at 1944). However, "evidence of a lack of genuineness of the relationship is also relevant in examining whether a relationship was entered into for status or a privilege under the Act" (*ibid*). Thus, despite the fact that the amended provision separates the primary purpose and genuineness tests and treats each as sufficient in and of itself to warrant a finding that a person is not considered a spouse, there can still be a close connection between the two in a given case. Evidence that a marriage is not genuine can support the inference that it was entered into primarily for an immigration purpose. The converse is also true.

[30] As the Regulatory Impact Analysis noted, these determinations can be exceedingly difficult. Officers must "proceed cautiously and carefully, ever aware of the need to facilitate family reunification, while at the same time safeguarding the integrity of the immigration process" (at 1944). There will rarely be direct evidence of an improper purpose. Instead, normally "intent must be inferred from the conduct of the parties and the particular circumstances of the case" (*ibid*). As a result, even though it is no longer sufficient for spouses simply to establish that they are in a genuine marriage (because the decision-maker can disqualify the marriage solely because it was entered into primarily for an immigration purpose), evidence concerning the genuineness of the marriage can still have a bearing on whether an adverse conclusion about the parties' intentions when they got married should be drawn (*Lawrence v Canada (Citizenship and Immigration)*, 2017 FC 369 at paras 14-15; *Trieu v Canada (Citizenship and Immigration)*, 2017 FC 925 at paras 37-38). The failure to consider such evidence can be a reviewable error.

[31] In the present case, the officer wrote that "Regulation 4 states that a foreign national shall not be considered a spouse of a person if the marriage is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act." This is arguably an error because it reflects the previous version of section 4(1) of the *IRPR*, not the current version. However, this would not assist Mr. Idrizi because any such error would have inured to his benefit and, in any event, the officer quotes the correct version of section 4(1) of the *IRPR* elsewhere.

[32] The real difficulty with the decision is that, having decided to focus on evidence relating to whether Mr. Idrizi and Ms. Ruko were living together, the officer fails to make the findings of

fact necessary to tie that evidence to the two questions in issue. Mr. Idrizi and Ms. Ruko had to show that they did not get married for an immigration purpose and that their marriage is genuine. As a matter of logic and common sense, evidence relating to cohabitation is relevant to these questions. The officer found that the spousal status should not be recognized on both grounds under section 4(1) of the *IRPR*: the marriage was entered into primarily for the purpose of acquiring any status or privilege under the Act and it is not genuine. However, the officer does not make the findings of fact necessary to support these conclusions. The result is a decision that lacks justification, transparency and intelligibility.

[33] It is indisputable that Mr. Idrizi's and Ms. Ruko's current or recent living arrangements could indirectly reveal something about their intentions when they got married in June 2016. The problem is that the officer did not make an express finding that they were not (or had not been) living together or link such a finding to their intentions when they got married. At the interview, the officer did not question Mr. Idrizi or Ms. Ruko at all about their intentions when they got married. In the decision, the officer does not explain in any way how evidence relating to their cohabitation supported the conclusion that the marriage was entered into primarily for an immigration purpose. No other evidence is relied on for this conclusion. While there was evidence that arguably related more directly to Mr. Idrizi's and Ms. Ruko's intentions when they decided to get married (namely, their respective histories under the immigration and refugee process), the decision is silent about it.

[34] The evidence concerning Mr. Idrizi's and Ms. Ruko's living arrangements was also relevant to the genuineness of their marriage at the present time. There was evidence suggesting

that they were not living together, which could support a finding that their marriage is not genuine. There was also evidence suggesting that they were living together, which could support a finding that the marriage is genuine. There was even evidence suggesting that they may have lived together at some times but not at others. It was the officer's role to weigh all this evidence and to make the necessary findings of fact. It is not the reviewing court's role to second-guess that weighing exercise. However, as noted, the officer never made an express finding that Mr. Idrizi and Ms. Ruko were not living together. Instead, the officer found the conflicts in the evidence on this point to be sufficient to conclude that the relationship is not genuine. In the absence of a finding of fact on the key question of whether Mr. Idrizi and Ms. Ruko lived together, the foundation for the officer's ultimate conclusion is uncertain at best.

[35] Mr. Idrizi contends that the officer erred by relying on inconsistencies regarding peripheral details or matters on which someone could be honestly mistaken. While this may be arguable in some respects (e.g. the time Mr. Idrizi returned home from work the previous evening), it is very doubtful in others (e.g. whether Mr. Idrizi had met Ms. Ruko's parents).

[36] In my view, the more telling flaw in the decision identified by Mr. Idrizi is the officer's failure to give any meaningful consideration to evidence that arguably weighed heavily in favour of the genuineness of the marriage – namely, the fact that Mr. Idrizi and Ms. Ruko had had a child together. The officer asked only a few inconsequential questions about the child and whether Mr. Idrizi and Ms. Ruko wanted to have another (to which questions they provided mutually consistent responses). The officer's conclusory statement that the "existence of a child is not determinative of a positive decision," while correct, is insufficient. By any measure, the

fact that Mr. Idrizi and Ms. Ruko had had a child together is a significant consideration in assessing the genuineness of their marriage yet it is dismissed in an entirely cursory fashion. There may well be good reasons to find that it does not tip the balance in Mr. Idrizi's favour. It was the officer's responsibility to set them out in a comprehensible way. This was not done.

[37] The fact that Mr. Idrizi and Ms. Ruko had had a child together could also support the inference that their marriage was not entered into primarily for an immigration purpose. The officer does not engage with this question in any way whatsoever before drawing an adverse conclusion about why Mr. Idrizi and Ms. Ruko got married.

[38] Read as a whole and against the backdrop of the record, the reasons fail the *Dunsmuir* test. They simply do not allow the reviewing court to understand why the evidence led to the conclusion it did, nor do they permit the court to determine whether this conclusion is within the range of acceptable outcomes. It is not for the reviewing court "to supply the reasons that might have been given and make findings of fact that were not made" (*Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11, quoted with approval in *Delta Air Lines Inc v Lukács*, 2018 SCC 2 at para 28). As a result, the decision must be set aside and the matter must be reconsidered.

## VI. CONCLUSION

[39] For these reasons, the application for judicial review is allowed, the decision of the IRCC officer dated August 27, 2018, is set aside, and the matter is remitted for redetermination by a different officer.

[40] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

**JUDGMENT IN IMM-4470-18**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is allowed.
2. The decision of the IRCC officer dated August 27, 2018, is set aside and the matter is remitted for redetermination by a different officer.
3. No question of general importance is stated.

"John Norris"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4470-18 |
| **STYLE OF CAUSE:** | MARSEL IDRIZI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MAY 16, 2019 |
| **JUDGMENT AND REASONS:** | NORRIS J. |
| **DATED:** | SEPTEMBER 18, 2019 |

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| Laoura Christodoulides | FOR THE RESPONDENT |

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