

**Date: 20070629**

**Docket: IMM-6049-06**

**Citation: 2007 FC 685**

**Ottawa, Ontario, June 29, 2007**

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

**BETWEEN:**

**MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Applicant**

**and**

**MARJORIE ELLEN MATHEW**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**Introduction**

[1] This is a judicial review application by the Minister of Citizenship and Immigration (the Minister) who seeks to set aside the decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada (the tribunal) rendered on October 25, 2006, allowing, pursuant to section 65 of the *Immigration and Refugee Protection Act*, (the Act) the sponsorship appeal of Marjorie Ellen Mathew (the appellant) from the decision of a visa officer in Nairobi, Kenya, who denied, on March 18, 2005, her application to sponsor Gilbert Kiriagoh Mathew Mogusuh (the applicant) for permanent residence to Canada, whom she married in Kenya on April 30, 1999.

[2] The visa officer's refusal was based on paragraph 40(1)(a) of the *Act* which provides "...a foreign national is inadmissible for misrepresentation for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error on the administration of the *Act*."

[3] On appeal, counsel for the Minister added, with leave of the tribunal, a second ground based on section 4 of the Immigration and Refugee Protection Regulations (the Regulations) which provides no foreign national shall be considered a spouse "if the marriage is not genuine or was entered into primarily for the purpose of acquiring any status or privilege under this *Act*."

[4] Attached as annex A to this judgment are sections 40, 65, 66 and 67 of the *Act* and section 4 of the *Regulations*.

### **Background**

[5] Marjorie Mathew, (the appellant) is a retired school teacher and is now 69 years of age. She is a very religious person who has given time and money to help others in Africa. She met Mr. Mogusuh, who is now 35 years of age, in 1991 in Mombassa, Kenya, after she had worked in Swaziland for 10 months with Canadian Crossroads International.

[6] Mr. Mogusuh at an early age was orphaned, raised by his grandmother and then by his uncle. At the time he met the appellant he had achieved only a grade 10 education having dropped out of school when his aunt and uncle disagreed about further paying his high school fees.

[7] After meeting Mr. Mogusuh, the appellant, whose husband, with whom she had 2 children, passed away in 1974, told him she wanted to sponsor him to finish school. She sent him \$500 dollars in January, 1992, and he went back to school. She continued to provide for his education and they kept in touch by letters and telephone. Ms. Mathew returned to Kenya in 1996 to see the applicant after doing missionary work in Nairobi and that is when they began to discuss marriage.

[8] The appellant returned to Kenya in 1998 and 1999. During the 1999 trip, she decided she would accept his offer of marriage; they were married in the office of the Justice of the Peace on April 30, 1999, with four friends present and they held a small reception later. Mrs. Mathew came back to Canada a day or so after the marriage but returned later that year to Kenya for her honeymoon then returning back to Canada. She visited and cohabitated with Mr. Mogusuh for between a month and three months every year since 1999, except for the year 2006 when she was undergoing treatment for cancer of the tongue.

[9] After the marriage she provided for his medical treatments, set him up in business and purchased a rental property.

[10] In August of 1999, she applied to sponsor her spouse for a permanent resident visa but that application was refused on medical grounds that Mr. Mogusuh was afflicted both with HIV as well as drug-resistant tuberculosis. She was aware of his HIV condition before she married him. An appeal from this decision was filed but was subsequently withdrawn.

[11] A second sponsorship application was filed on January 28, 2004. The applicant was interviewed by a visa officer on January 6, 2005. This application was refused by the visa officer on grounds of intentional misrepresentation. The Visa post had received an unsigned “poison pen” letter enclosing a photograph depicting Mr. Mogusuh sitting beside a woman in a wedding dress signing a paper. At his interview, he was challenged by the visa officer. In denying Mr. Mogusuh’s application for permanent residence sponsored by Ms. Mathew, the visa officer wrote:

“I reached this determination because at the time of our interview on January 6, 2004, [sic] our office was in possession of a photograph where you appeared to be engaged in a wedding ceremony with a woman other than your spouse. When I showed you this photograph, you hesitated for a long period and then explained that the photograph portrayed your brother’s wedding at which you were a witness. You stated you could provide proof that this and I told you I would give you an opportunity to do so prior to rendering a decision on your case. On January 25, 2005 we received an envelope of photos and other documentation from you. In this envelope you provided a series of photos purportedly of your brother’s wedding. One of the photos included was exactly the same as that shown to you at the time of interview except that your head had been replaced by the head of another man. The other photos in this series showed visible scan lines and problems of lighting and perspective.

The misrepresentation or withholding of this/these material fact(s) induced or could have induced errors in the administration of the *Act* because if an officer had been satisfied that your relationship to ou sponsor was genuine, you could have been incorrectly found to be a member of the family class.

[12] Mrs. Mathew appealed the visa officer's decision to the tribunal. She testified in person, Mr. Mogusuh testified via video-link from Kenya. Her daughter, Deborah, aged 44, testified in support of the appeal. They were cross-examined by counsel to the Minister.

[13] An appeal before the tribunal in sponsorship cases is a hearing *de novo* and additional evidence that was not before the visa officer may be taken into account on appeal. The burden of proof, on a balance of probabilities, rests with the appellant.

[14] Before the tribunal, counsel for the Minister stated "we have no doubt the marriage is genuine in the eyes of the sponsor." He focused on Mr. Mogusuh. He stated from Mr. Mogusuh's perspective, the marriage was a marriage of convenience and his purpose was to gain admission into Canada as a permanent resident.

[15] After hearing the witnesses, the tribunal asked for written argument; both counsel complied. The Minister's submissions were lengthy, covering 55 paragraphs over 27 pages. Mr. Mogusuh's credibility was a central point in his representations.

### **The Tribunal's Decision**

[16] The material findings made by the tribunal were:

1. While acknowledging "it is with some difficulty that I try to determine who altered the photos", the tribunal found it was likely, upon being confronted by the visa officer with the photos of his brother's (cousin's) wedding, Mr. Mogusuh, "in order to protect himself from being wrongly accused, ordered the negatives to be doctored." It characterized his actions by stating "the doctored photos were an unsophisticated attempt by the applicant to clear himself of being wrongly accused of entering into a second marriage.";

2. She found as a fact Mr. Mogusuh had not entered into a second marriage on August 30, 2002. For this determination, she relied upon a copy of the marriage certificate of the cousin's wedding where the applicant [Mr. Mogusuh] had signed as a witness. The tribunal also based its determination on a letter from the parents of the bride in that wedding who wrote their daughter was not married to Mr. Mogusuh and is married to Mohamed Shaban. This determination that Mr. Mogusuh did not marry a second time led the tribunal to state "there must be some mischief being created by someone, perhaps the author of the poison pen letter, in regards to the applicant.";

3. It held there was in evidence a certified copy of an entry of the marriage between Mrs. Mathew and Mr. Mogusuh. The tribunal mentioned the validity of the marriage, which was prior in time to the "cousin's" marriage, was not challenged by the Minister's counsel;

4. The tribunal described an avenue that was available to the appellant in this case was the discretionary grounds for special relief she quoted from the *Chirwa* case, *Chirwa v. Canada (Minister of Citizenship and Immigration)* (1970) 4 I.A.C. 388, delineating humanitarian and compassionate considerations as "...taken as those facts, established by the evidence, which would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another...". She added, "Further included are the interests of any child that might be affected by the outcome of this appeal and any other consideration raised at the hearing. The panel also considered the credibility of the witnesses. It should be noted that not one of these factors is determinative in itself but all of the circumstances are weighed in the context of the issued before the panel."

5. While not condoning Mr. Mogusuh's misrepresentation to the immigration authorities she stated "it seems what we have here is an intentional misrepresentation that would not induce an error in the administration of the Act as I did not find, on a balance of probabilities, that the applicant had entered into a second marriage. [Emphasis mine]

6. She found "that there are humanitarian and compassionate considerations for allowing the appeal in regards to the doctored photos. In particular, I find that the parties have a genuine marriage, though unusual, for the following reasons." [Emphasis mine]. The tribunal then listed the following considerations for coming to this conclusion:

- The Minister's counsel agrees Mrs. Mathew is genuine in her relationship with Mr. Mogusuh;
- There are documents in evidence showing Mrs. Mathew has visited Mr. Mogusuh at least five times since the marriage and they have cohabited each time, a fact which has not been challenged and is corroborated by photos of them together;

- There is in evidence sufficient proof of written and telephone contact between the parties for many years;
- Mrs. Mathew has changed her name, her name on her assets, her will and Mr. Mogusuh and she have entered into a post-nuptial agreement setting out their rights and obligations in regard to their marriage. The tribunal had previously found this agreement, dated February 9, 2000, provided most of her assets, which are considerable, will be passing to her children upon her death;
- Mrs. Mathew has contributed substantial financial support for Mr. Mogusuh's living and his medication;
- While acknowledging there are large age and cultural differences between them, Mrs. Mathew seems to have risen above these differences and has become truly devoted to the applicant. There are letters in evidence in support of their loving relationship and also from the appellant's children, from the appellant's three sisters and brother, her 48-year-old niece and the Pastor of her church. She added the applicant seems to be taken care of by the appellant financially and emotionally, having been orphaned himself and with little hope for the future working as a Coolie. These factors could well offset disadvantages in their relationship due to the age and cultural differences, she found.
- She referred to two letters in evidence from a business associate of Mr. Mogusuh and from another person both of whom have personal knowledge of the sixth wedding anniversary celebrations between the two, finding the letter credible;
- Though the wedding ceremony between them was a civil one and not attended by the appellant's children she found "to be not a significant factor in light of the age of the appellant and the fact that the wedding was held in Kenya, far from her family. I am of the opinion that the appellant herself felt that she might have difficulty having her family accept that she married the applicant."

### Analysis

#### The Minister's Position

[17] Counsel for the Minister argued four points in this judicial review application.

[18] First, he argued the tribunal applied the wrong test under section 65 of the *Act*. He states this section required a two-step sequential determination: the tribunal first had to be satisfied Mr.

Mogusuh is a member of the family class, i.e., is the genuine spouse of Mrs. Mathew and, after having done that, then proceed to determine whether there are sufficient humanitarian and compassionate factors to warrant granting Mr. Mogusuh an exemption from any applicable criteria or obligation under the *Act*. Essentially, he argued the tribunal collapsed the issue of genuineness of the marriage with the H&C factors by providing reasons regarding the *bona fides* of the marriage as proof that H&C factors existed.

[19] Second, in the H&C context, counsel for the Minister further argued the tribunal failed to consider an important factor- hardship to Mr. Mogusuh – relying upon the Federal Court’s decision in *Canada (MCI) v. Ibraheem* (2006) FC 1197 and the Overseas Processing Manual.

[20] Third, counsel for the Minister submits the tribunal did not have regard to all of the evidence before it in coming to a finding regarding the issue of credibility. He states in this case there are two allegations of misrepresentation and that the tribunal failed to have regard to the second one which arises by contrasting what he said to the visa officer and what he told the tribunal. He submits at the interview Mr. Mogusuh told the visa officer he had never seen the photograph and did not know the identity of the parties but, when confronted, did admit he was the person in the photo. At the hearing, he testified he never denied to the visa officer that it was him in the photograph. Counsel for the Minister submits what he told the tribunal directly contradicts the events of the interview as per the visa officer’s CAIPS notes. He submits either Mr. Mogusuh is lying or the officer is. He states if Mr. Mogusuh is lying, this constitutes a new and separate misrepresentation and would seriously undermine his credibility. This was pointed out to the tribunal in written argument but

there is no mention of it in the reasons of the tribunal. He submits the tribunal was obligated to consider whether he had committed another misrepresentation as it was highly relevant to his credibility which was already an issue. He concluded stating the tribunal's failure to consider this evidence regarding his credibility, regarding whether he deliberately lied to the tribunal constitutes a reviewable error.

[21] Fourth, and finally, he submits the tribunal erred in fact in finding Mr. Mogusuh credible, a determination which affects the finding that his marriage is *bona fide*. He argues the tribunal ultimately found that, notwithstanding the intentional misrepresentation, the marriage was *bona fide*. He submits this finding, in the face of the evidence before the tribunal, is capricious and patently unreasonable, submitting Mr. Mogusuh's actions of deliberately lying to the visa officer in stating that he had never seen the photograph before and also tampering with the five photographs by replacing the head of the man in the picture with that of someone else is extreme and ought to have negatively affected his credibility. To find otherwise is capricious. The ultimate finding that the marriage is *bona fide* is based on this flawed finding of credibility, he says.

### **The Standard of Review**

[22] Applying the wrong test or ignoring a relevant factor in the exercise of the discretion are questions of law not within the tribunal's expertise and are reviewable on the standard of correctness, no deference being accorded.

[23] The jurisprudence of this Court is constant to the effect a tribunal's determination of credibility is a finding of fact reviewable on the basis provided in section 18.1(4)(d), a finding made in a perverse or capricious manner or without regard for the material before it. This ground for review is analogous to the standard of review of patent unreasonableness which the Minister concedes is the applicable standard.

### **Conclusions**

[24] After reading the certified tribunal record including the hearing before the tribunal and for the reasons expressed below, I conclude this judicial review application must be allowed. But before expressing those reasons, I cite two legal principles which I took into account in reaching this decision:

1. The reasons of an administrative tribunal are not to be read and analysed microscopically. As stated by Justice Laskin, as he then was, in *Boulis v. Minister of Manpower and Immigration* [1974] S.C.R. 874 at 885 where he wrote "its reasons are not to be read microscopically; it is enough if they show a grasp of the issues that are raised by section 15(1)(b) and of the evidence addressed to them, without detailed reference. The record is available as a check on the Board's conclusions."
2. In *Canadian Union of Public Employees, Local 301, v. Montreal (City)* [1997] 1 S.C.R. 793 at 844, Justice L'Heureux-Dubé on behalf of the Supreme Court of Canada stated that Courts are not to re-visit the facts or weigh the evidence of an administrative tribunal.

[25] Clearly section 65 of the *Act* requires a two-step analysis. First, a determination must be made Mr. Mogusuh is Mrs. Mathew's spouse. The Minister put in issue the marriage was not genuine from Mr. Mogusuh's perspective. That issue had to be determined first. My reading of the tribunal's decision is that it was not. Rather, as counsel for the Minister points out it was only at the H&C stage the tribunal made a finding of genuineness. This conclusion is inevitable from the decision itself where it stated "I find that there are humanitarian and compassionate considerations for allowing the appeal in regards to the doctored photos. In particular, I find that the parties have a genuine marriage...." [Emphasis mine]

[26] Parliament's intent is clear that before waiving a breach of the *Act* (here misrepresentation) on H&C factors, the marriage, if challenged, as it was here, had to be determined to be genuine.

[27] In coming to this conclusion I do not say that elements of a genuine marriage cannot inform H&C factors; it is evident they can. On the other hand, factors leading to the genuineness of a marriage cannot be a complete substitute for relevant H&C factors justifying an override of an otherwise valid visa officer's decision which is a different purpose than the factors which test whether the marriage is genuine or not. Support for this conclusion is that, in the Departmental Guidelines, the factors for allowing an appeal on H&C considerations on a sponsorship appeal are different than those which are used to test a genuine marriage. Something more is required and that something more is not present here.

[28] I need not comment on the Minister's submission with respect to the tribunal having failed to take into account the hardship factor except to say hardship is not mentioned as one of the factors in the Overseas Manual (OP 21-Appeals) while it is a major consideration for in-Canada applications on H&C grounds for an in-Canada waiver of regulatory requirements which was the basis of the Federal Court's decision in *Irimie v. Canada* (2000) F.C.J. 1906.

[29] Second, the tribunal determined at paragraph 21 of its reasons Mr. Mogusuh at the interview said "he at first did not recognize himself in the photo." However, as pointed out by the Minister's counsel, at the hearing, he denied having said to the visa officer the man in the picture was not him. Without saying so the tribunal found Mr. Mogusuh to have lied a second time but drew no impact from such misrepresentation either in terms of his credibility or how it might affect the H&C factors.

[30] Third, I find the tribunal's credibility analysis defective. In fact, there was no credibility analysis but only the statement "the panel also considered the credibility of the witnesses" without more.

[31] The tribunal failed to come to grips with the Minister's case. These elements are identified in the written representations submitted to the tribunal by the Minister's counsel at the hearing.

They include:

- Why he only told Mrs. Mathew in 1998 he was HIV positive;
- The plausibility of the circumstances of being obligated to use negatives which produced "funny" photos and the plausibility of not being able to provide unaltered

photos of his cousin's wedding which were in the possession of the brother-in-law of the groom;

- The lack of corroborative evidence in many instances;
- The plausibility of meeting the author of the poison pen letter, their attendance at a police station, yet the Canadian Embassy not being advised of this fact;
- The rationale given for not advising the family before the marriage ceremony took place – the cost of the phone call;

[32] For these reasons, the tribunal's decision cannot stand.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES** that this application for judicial review is allowed, the tribunal's decision is quashed and the matter is remitted to the Immigration Appeal Division for re-determination by a different panel. No certified question was proposed.

\_\_\_\_\_  
"François Lemieux"

Judge

## ANNEX A

### **Immigration and Refugee Protection Act 2001, c. 27 I-2.5**

### **Loi sur l'immigration et la protection des réfugiés 2001, ch. 27 I-2.5**

#### Misrepresentation

#### Fausse déclarations

40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation

40. (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :

(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;

a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

(b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;

b) être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations;

(c) on a final determination to vacate a decision to allow the claim for refugee protection by the permanent resident or the foreign national; or

c) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile;

(d) on ceasing to be a citizen under paragraph 10(1)(a) of the Citizenship Act, in the circumstances set out in subsection 10(2) of that Act.

d) la perte de la citoyenneté au titre de l'alinéa 10(1)a) de la Loi sur la citoyenneté dans le cas visé au paragraphe 10(2) de cette loi.

#### Application

#### Application

(2) The following provisions govern subsection (1):

(2) Les dispositions suivantes s'appliquent au paragraphe (1) :

(a) the permanent resident or the foreign national continues to be inadmissible for

a) l'interdiction de territoire court pour les deux ans suivant la décision la constatant en dernier ressort, si le résident

misrepresentation for a period of two years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and

(b) paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility.

Humanitarian and compassionate considerations

65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.

Disposition

66. After considering the appeal of a decision, the Immigration Appeal Division shall

(a) allow the appeal in accordance with section 67;

(b) stay the removal order in accordance with section 68; or

permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi;

b) l'alinéa (1)b ne s'applique que si le ministre est convaincu que les faits en cause justifient l'interdiction.

Motifs d'ordre humanitaires

65. Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire.

Décision

66. Il est statué sur l'appel comme il suit :

a) il y fait droit conformément à l'article 67;

b) il est sursis à la mesure de renvoi conformément à l'article 68;

(c) dismiss the appeal in accordance with section 69.

c) il est rejeté conformément à l'article 69.

Appeal allowed

Fondement de l'appel

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

(a) the decision appealed is wrong in law or fact or mixed law and fact;

a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

(b) a principle of natural justice has not been observed; or

b) il y a eu manquement à un principe de justice naturelle;

(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

Effect

Effet

(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.

(2) La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.

**The Regulations**

**Immigration and Refugee  
Protection Regulations  
SOR/2002-227**

**Bad faith**

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.

**Règlement sur l'immigration  
et la protection des réfugiés  
DORS/2002-227**

**Mauvaise foi**

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.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-6049-06

**STYLE OF CAUSE:** MINISTER OF CITIZENSHIP AND IMMIGRATION v.  
MARJORIE ELLEN MATHEW

**PLACE OF HEARING:** Winnipeg, Manitoba

**DATE OF HEARING:** June 14, 2007

**REASONS FOR JUDGMENT  
& JUDGMENT:** LEMIEUX J.

**DATED:** June 29, 2007

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