Date: 20071114

Docket: IMM-6393-06

Citation: 2007 FC 1181

Toronto, Ontario, November 14, 2007

PRESENT: The Honourable Mr. Justice Blais

BETWEEN:

PHANG SOKPHEARUM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of an Immigration Program Manager (the decision maker) stationed at the Visa Section of Singapore, dated November 21, 2006, denying the applicant's request for humanitarian and compassionate consideration (H & C) pursuant to subsection 25(1) of the Act.

Background

[2] Khorn Huong (the sponsor) has been the applicant's alleged wife since June 22, 2006. She submitted an application to sponsor the applicant under the spousal class but was found to be ineligible because she had already sponsored a spouse (an ex-spouse who filed for divorce on March 21, 2006) and her three year undertaking in that sponsorship will not expire until April 4, 2008.

Decision under Review

[3] The decision maker determined that the H & C considerations did not justify granting permanent residence to the applicant or exemption from any applicable criterion and obligation of the Act. This is not only because of her doubt that the relationship between the applicant and his sponsor was *bona fide*, but also due to the fact that his sponsor's previous marriage was probably one of convenience. In addition, the decision maker was not convinced that the applicant was the father of the child his sponsor was carrying.

Issue for Consideration

[4] Did the decision maker breach the duty of procedural fairness owed to the applicant or make an unreasonable finding of fact?

Standard of Review

[5] In *Terigho v. Canada (Minister of Citizenship and Immigration),* [2006] F.C.J. No. 1061, Justice Richard Mosley discussed the standard of review for such decisions at paragraphs 6 and 7:

> The appropriate standard of review for decisions made under section 25 is reasonableness. Considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role in the statutory scheme as an exception, the fact the decision-maker is the Minister, and the wide discretion evidenced by the statutory language: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193.
>
> Reasonableness is not about whether the decision maker came to the right result. As stated by Justice Iacobucci in *Canada (Director of Investigation and Research) v. Southam*, [1997] 1 S.C.R. 748 at paragraph 56, an unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. See also *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at paras 55-56.

[6] However, issues concerning procedural fairness should be reviewed on a standard of correctness (See e.g. *Shripnikov v. Canada (Citizenship and Immigration)*, 2007 FC 369, at paragraph 19).

Analysis

[7] The applicant alleges that the decision maker did not give him an opportunity to address his concerns regarding the fact that he was a *bona fide* student or that the relationship with his

sponsor was not *bona fide* since the previous marriage of the sponsor was probably not genuine. Finally, the applicant alleges that he ought to have been given an opportunity to address the decision maker's doubts about the applicant being the father of the sponsor's child who was born January 31st, 2007.

[8] On an H & C application for exemption, the onus of establishing his claim is on the applicant. Although it is true that the birth certificate cannot be obtained before the child is born and DNA testing might have been hard to obtain at that stage, I can find no breach of procedural fairness concerning the observations of the decision maker concerning the lack of evidence that the applicant is the father of the child.

[9] The decision maker relied on the decision of the visa officer concerning the student visa, which was denied because he was determined not to be a *bona fide* student. The applicant was well aware of that decision and I cannot believe that the applicant and his sponsor were not aware of the content of their own application forms, signed by them. The applicant even had the help of an interpreter to complete his form.

[10] Neither the applicant nor the sponsor has had the opportunity to be interviewed.

[11] The respondent relies on the Federal Court of Appeal's decision *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, which states at paragraph 8:

> H & C applicants have no right or legitimate expectation that they will be interviewed. And, since applicants have the onus of establishing the facts on which their claim rests, they omit

> pertinent information from their written submissions at their peril.
> […]

[12] On the other hand, in *Hakrama v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 85, Mr. Justice John A. O'Keefe held, at paragraph 23 :

> Upon review of the officer's notes and the file material, I cannot determine what facts would support the officer's finding that the marriage was not *bona fide*. The fact that a couple do not have a joint bank account or do not have both of their names on utility bills does not mean that their marriage is not *bona fide*. There were documents before the officer which indicated that the couple were married and lived together. If the officer doubted the credibility of the documentary evidence presented to show that the couple were in a *bona fide* marriage, the officer should have called them in for an interview, since there was no factual evidence to show that they were not married.

[13] Unlike the case cited above, the applicant never requested an interview and the decision maker wrote in the CAIPS notes :

> While the above may give the impression that the current relationship may be genuine, the many inconsistencies on file and PA's negative history with our department suggest otherwise.
>
> For example, as late as March 2006, PA re-applied for a student permit in Bangkok. Throughout his application he failed to mention about sponsor and his relationship with her. This is not consistent with a bona fide relationship.
>
> PA was considered a non bona fide student. His English was poor despite having been on student permit for a few years. Obviously he was not attending classes.

[14] In my opinion, the decision maker had sufficient facts before her to support the finding that the relationship was not genuine.

[15] Unlike the case cited above, this was not the first marriage of the sponsor. Moreover, the fact that the sponsor sent the marriage certificate of her previous sponsorship application in

December 2004 while the applicant declared in the “Sponsored spouse/partner questionnaire” at question 11, that she introduced him to her Brother on October 31st, 2004 gives a factual basis to the decision maker not to believe the sponsor’s first marriage to be genuine.

[16] It has been held by Justice Richard Mosley in *Bui c. Canada (Ministre de la Citoyenneté et de l'Immigration),* 2005 CF 816, at paragraph 13:

> I am satisfied that there was no breach of procedural fairness in this case. Mr. Bui was given sufficient opportunities to present evidence relevant to his application and what he submitted was fully and fairly considered. That he received poor advice from the paralegal he first consulted is unfortunate, but he chose that counsel. It is not sufficient to say now that he did not know what was being filed over his signature: *Cove v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 266. It was his responsibility to ensure that the information was accurate. The officer cannot be faulted for not convening an interview to determine what was false and what was accurate in his written submissions.

[17] In the case at bar, the applicant is trying to explain information given by him and his sponsor previously. In his affidavit submitted in support of this application for judicial review, the applicant swore that he moved in with his sponsor in July 2005. The applicant, in the “Sponsored spouse/partner questionnaire” wrote at question 9: “On 18 February 2005 we cohabite at Hamilton”. He signed this form and had the help of an interpreter when he completed the questionnaire. In the “Sponsor questionnaire – Sponsorship of a spouse, common-law partner or conjugal partner”, at question 12, the sponsor declared: “I have cohabited with my husband Phang Sophirum since February 18, 2005 until July 15, 2006”.

[18] The applicant further explains, in his affidavit, the fact that he did not mention his relationship with his sponsor in his March 28, 2006 interview held in Bangkok – concerning his application for a student visa – was because he only got married to his sponsor June 22, 2006. I would like to point out that it appears from the CAIPS notes dated April 25, 2006 (so less than a month later and still before the wedding) that during another interview for a student visa held in Singapore, the applicant actually did speak about his fiancée and I quote:

> Stated he left Cda on 15MAR for home visit as he needed to tell his parents that he wants to get married in JUL06 in Cda. HOF has not been attending lessons for 6 weeks, he does not know the vacation schedule of school in Cda.

[19] Thus, I find that the explanation submitted by the applicant is incoherent and of no help to his case. Even if a breach of procedural fairness was found in the case at bar, it is clearly a case where further written submissions or an interview would have led the decision-maker to the same conclusion.

[20] I am not convinced that the decision maker made a reviewable error in not allowing an interview in this case.

[21] The Applicant cannot suggest that the visa officer did not take into consideration some important pieces of evidence like photographs of the wedding, list of phone calls made in Cambodia. In fact, the visa officer had no obligation to mention all pieces of evidence and to comment on each of them. The decision is based on all the evidence provided. Photographs of a wedding could be evidence of such a ceremony; nevertheless, it does not prove *per se* that the relationship between the sponsor and the applicant was a genuine or *bona fide* relationship.

[22] This is not a case where the decision maker disregarded to the evidence before her, but one where the presumption that all the material has been considered has not been rebutted (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 at paragraph 16 (QL).

[23] Essentially, the applicant is asking this Court to consider the concerns raised by the decision maker in her decision and the explanations provided by the applicant in this judicial review, and to re-weigh the evidence to come to a different conclusion. It is not the place of this Court to do so. Having carefully considered the decision of the decision maker, I cannot conclude that the decision maker based her decision on an erroneous finding of fact that was made in a perverse or capricious manner or without regard for the material before her.

[24] For the above reasons, the judicial review is dismissed.

[25] Neither counsel provided a question for certification.

JUDGMENT

THIS COURT ADJUDGES that:

1. The application is denied.

2. There is no question for certification.

"Pierre Blais"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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