

Federal Court



Cour fédérale

**Date: 20100211**

**Docket: IMM-4154-09**

**Citation: 2010 FC 144**

**Ottawa, Ontario, February 11, 2010**

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

**BETWEEN:**

**FAHAMIDA BHUIYAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] Fahamida Bhuiyan is a young Montrealer of Bangladeshi origin. In 2006, she married Nazim Uddin Mir, a citizen of Bangladesh, in Bangladesh.

[2] She applied to sponsor him as a permanent resident. The visa officer denied the application on the grounds that the marriage was “not genuine and was entered into primarily for the purpose of

acquiring any status or privilege under the Act.” Section 4 of the *Immigration and Refugee Protection Regulations* provides that such a person shall not be considered a spouse.

[3] Fahamida appealed to the Immigration Appeal Division of the Immigration and Refugee Board. Her appeal was dismissed. This is the judicial review of that decision.

### **BACKGROUND**

[4] The marriage was arranged by both families who go back many, many years together. Indeed, Fahamida’s sister is married to Nazim’s brother.

[5] Fahamida has a learning disability. However, based on a report from a psychologist, the Panel accepted that she was capable of love, capable of marriage and entered into the marriage in good faith.

[6] However, the Panel determined the marriage was not genuine because Fahamida’s parents wanted someone who would support her for the rest of her life and that Nazim was chosen as a caretaker in a mutually beneficial arrangement which was agreed upon by the respective families. Such a caretaker arrangement is not the basis of a genuine marriage. Furthermore, Nazim’s motives were suspect and there were said to be credibility issues. Nazim was twice interviewed by telephone by the Panel. Unfortunately, the tape of the first hearing has been lost.

[7] Both parties were of the view that the Court could, nevertheless, reach a decision on the merits of the judicial review, the applicant taking the position that the decision was unreasonable and the Minister submitting that the decision was well within the range of reasonable outcomes as set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[8] I expressed grave concerns at the hearing as to whether I was in a position to fairly assess the reasonableness of the decision in light of the fact that a transcript of the first hearing is not available, and given that Nazim was found not to be credible.

[9] Nazim was also interviewed at the second hearing for which a transcript is available. However, that interview is limited to the significance of a Valentine's Day card he, with very limited English, sent to Fahamida, signing it "your lover."

[10] The Panel was somewhat concerned that the marriage was not consummated immediately, and seems to imply that signing a card "your lover" was an attempt to move up the consummation date. Nazim's explanation was perfectly sensible. "I am her husband, she is my wife I am her lover." It does not necessarily follow that their marriage had been consummated, or that delays were indicative of a caretaker relationship. Certainly, one cannot reasonably infer from that card, taken alone, that Nazim is not credible.

[11] It may well be that the transcript of the first hearing would amply demonstrate why the Panel considered that Nazim was not credible, but this brings natural justice into issue, front row and centre.

[12] As stated by Madam Justice L’Heureux-Dubé, on behalf of the Supreme Court, in *Canadian Union of Public Employees, Local 301 v. Montréal (City)*, [1997] 1 S.C.R. 793, at para. 81:

In the absence of a statutory right to a recording, courts must determine whether the record before it allows it to properly dispose of the application for appeal or review. If so, the absence of a transcript will not violate the rules of natural justice. Where the statute does mandate a recording, however, natural justice may require a transcript. As such a recording need not be perfect to ensure the fairness of the proceedings, defects or gaps in the transcript must be shown to raise a “serious possibility” of the denial of a ground of appeal or review before a new hearing will be ordered. These principles ensure the fairness of the administrative decision-making process while recognizing the need for flexibility in applying these concepts in the administrative context.

[13] Neither the *Immigration and Refugee Protection Act* nor the Regulations require a recording of a hearing before the Immigration Appeal Division, or that a transcript be prepared. The authorities were comprehensibly reviewed very recently by Mr. Justice Mainville in *Canada (Minister of Citizenship and Immigration) v. Liang*, 2009 FC 955.

[14] In the case at bar, absent a transcript, there is not sufficient information for me to reach a decision and, therefore, a new hearing is required.

[15] Indeed, what is in the record suggests that the Panel examined the record with excessive zeal, and with a modern view, which may not sit well with older views of marriage, views which were current in this country not very long ago.

[16] There is nothing wrong with an arranged marriage, if the spouses agree. Until the last fifty years or so, in Canadian urban centres, the ideal marriage was seen to be one in which the husband was the bread-winner and the wife the home-maker. Perhaps the Bhuiyans are followers of that school of thought. Indeed, would not parents want their daughter to marry someone who would take care of her? Consider the following provisions about the duties of husband and wife taken from the *Quebec Civil Code*: “[spouses] owe each other respect, fidelity, succour and assistance” (article 392); they “contribute towards the expenses of the marriage in proportion to their respective means. The spouses may make their respective contributions by their activities within the home” (article 369). In any event, Fahamida is presently employed, which suggests she would be able to financially contribute to household expenses.

[17] The Panel made much of the fact that the wedding in Bangladesh, although admittedly legal, was not as full-blown a Muslim ceremony as it might have been. I fail to understand why an elaborate marriage ceremony would indicate good faith on Nazim’s part, while a simpler ceremony would not, especially since Fahamida’s step-father is Hindu.

[18] I am also concerned with the emphasis the Panel placed on the delay in the consummation of the marriage, a marriage between two people who grew up half a world apart. It does not follow

that this is a caretaker relationship, especially since there are indications from husband and wife that the marriage has been consummated, perhaps to the initial surprise of Fahamida's parents. What went on behind closed doors is none of Fahamida's parents' business, and certainly their understanding of it cannot be preferred over the testimony of the participants. Again, however, we do not have the transcript of what Nazim said on the subject.

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

**ORDER**

**FOR REASONS GIVEN;**

**THIS COURT ORDERS that:**

1. The application for judicial review is granted.
2. The decision rendered by the Panel of the Immigration Appeal Division of the Immigration and Refugee Board is set aside.
3. The matter is referred back for rehearing by a differently constituted Panel.

“Sean Harrington”

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Judge

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

**DOCKET:** IMM-4154-09

**STYLE OF CAUSE:** Bhuiyan v. MCI

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** February 3, 2010

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

**DATED:** February 11, 2010

**APPEARANCES:**

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