Federal Court  Cour fédérale

Date: 20100211

Docket: IMM-1936-09

Citation: 2010 FC 140

Ottawa, Ontario, February 11, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

RAVI PRAKASH YADAV

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by an Immigration Officer, dated April 8, 2009, denying the applicant's application for permanent resident status under the Spouse or Common-law partner in Canada Class because the applicant's marriage is not genuine and was entered into primarily for the purpose of immigration.

[2] The applicant brought a motion pursuant to the *Federal Courts Immigration and Refugee Protection Rules* S.O.R./93-22 seeking a number of remedies independently of the merits of the

underlying application. Both the motion and application are disposed in the present Judgment and Reasons for Judgment.

FACTS

Background

[3] The thirty-one (31) year old applicant is a citizen of India. He entered Canada on April 17, 2002 on a student visa and has been here since. The applicant's sponsor, Ms. Nazila Hussein-Yadav, is a Canadian citizen. She married the applicant on April 3, 2005. A daughter was born to the couple on September 11, 2008.

[4] The applicant submitted an application for permanent resident status under the Spouse or Common-law partner in Canada Class on July 27, 2005. The Immigration Officer conducted separate oral interviews with the applicant and his sponsor on May 23, 2008, and rendered her decision ten and a half months later, April 8, 2009.

[5] Both the applicant and his sponsor have a long and complicated immigration history. The applicant first met the sponsor in December 2001 in Mumbai, India through their mutual friend, Mr. Jagpal Grewal, who dated the applicant for about two months in 2002. It is unclear why the sponsor was in India at the time. The applicant stated in his interview that the sponsor accompanied Mr. Grewal on family trip to India. The sponsor stated that she was in India at the time to marry her first husband, Mr. Nek Singh.

[6] A month later the applicant's sponsor married on January 9, 2002 to Mr. Singh. She submitted an application to sponsor Mr. Singh on August 6, 2002, which was refused on January 21, 2003 on the ground that the marriage was entered into for the purposes of immigration.

[7] Soon after arriving in Canada the applicant moved in with his sponsor in May, 2002. The applicant was introduced by his sponsor to Ms. Lee sometime after his arrival to Canada. The applicant, his sponsor, Ms. April Dawn Lee, and Mr. Grewal were all studying at the Southern Alberta Institute of Technology (SAIT) at the time of the applicant's introduction to Ms. Lee.

[8] The applicant married Ms. April Dawn Lee, Canadian citizen, on December 9, 2002. The sponsor attended their wedding. The applicant and Ms. Lee did not cohabit and Ms. Lee's parents were not aware of the marriage. Ms. Lee applied to sponsor the applicant under the Spouse or Common-law partner in Canada Class on February 17, 2003, but she withdrew her sponsorship on March 11, 2003. The applicant and Ms. Lee separated sometime in 2003 and divorce proceedings were initiated. The applicant purportedly started to seriously date the sponsor at the end of 2003. The applicant was living with his sponsor throughout his marriage and divorce to Ms. Lee.

[9] On May 11, 2003 the applicant made a claim for refugee protection. The applicant alleged that in July 2002 a gang led by Mr. Grewal, threatened the applicant with harm if he did not break up with the sponsor. The applicant's sponsor testified at the hearing that she was dating the applicant during the summer of 2002 when Mr. Grewal attacked and threatened the applicant. On October 3, 2003 a panel of the Refugee Protection Division of the Immigration and Refugee

Protection Board (RPD) denied the applicant's claim. The RPD found that the applicant's marriage to Ms. Lee was an attempt to obtain status and found that his allegations of risk were fabricated.

[10] On March 10, 2004 the applicant's departure became a deemed deportation order following his failure to confirm his departure. On January 7, 2005 and March 12, 2005 the applicant and sponsor's respective prior marriages were dissolved by judgement. On April 3, 2005 the applicant and his sponsor married. The applicant's application for permanent resident status under the Spouse or Common-law partner in Canada Class was submitted on July 27, 2005.

[11] The applicant continued to cohabit with his sponsor continuously except for a brief period of infidelity between October and November 2005 when the applicant moved in with Ms. Tasha Echreke. This is a point of controversy since the sponsor stated in the interview that the separation and infidelity occurred in either 2006 or 2007. The couple's accounts of the immediate circumstances surrounding the separation are also inconsistent.

[12] The Immigration Officer conducted separate oral interviews with the applicant and his sponsor on May 23, 2008 and recorded the questions and responses in his handwritten notes. On April 8, 2009 the Immigration Officer denied the applicant's application.

Decision under review

[13] The Immigration Officer recounted the couple's shared and separate immigration and relationship histories. The applicant submitted to the Immigration Officer that he began to seriously

date the sponsor in late 2003. The Immigration Officer held that this account contradicted the applicant's earlier account to the RPD where he stated that the sponsor was already his girlfriend by July 2002. The Immigration Officer concluded that the couple made different representations of their relationship depending on the type of application the applicant was pursuing at the time.

[14] The Immigration Officer surveyed the interrelationships between the applicant, his sponsor, Mr. Singh, Ms. Lee, and Mr. Grewal and determined that the progression of the applicant and sponsor's relationship amongst the five aforementioned individuals "reveals little consistent, logical, and credible account" of a shared life together.

[15] The Immigration Officer found that there were inconsistencies between the applicant's and sponsor's account of the circumstances around their separation, which included who picked the applicant up when he left the house and whether he came back later to pick up some belongings. Furthermore, the applicant and the sponsor recalled the applicant's extramarital affair in different years.

[16] The Immigration Officer held that the best interest of the couple's unborn child will not be affected by the applicant's deportation because the sponsor indicated a willingness to follow the applicant with the child back to India. The applicant's establishment was not given a lot of weight because he chose to remain in Canada despite the enforceable deportation order against him.

[17] The Immigration Officer concluded that the application will be refused because there was insufficient evidence of the existence of a genuine and ongoing marriage relationship between the applicant and his spouse which will indicate that this was not a marriage that has been entered into for the purpose of acquiring permanent residency in Canada.

THE APPLICANT'S PRELIMINARY MOTION WITH RESPECT TO THE LATE AND INCOMPLETE CTR

Background facts with respect to the motion

[18] In his Order granting leave Justice Russell set down the deadlines for the perfection of the pleadings. The Immigration Officer was ordered to send a Certified Tribunal Record (CTR) on or before October 8, 2009, and the applicant was required to submit any further affidavit on or before October 19, 2009.

[19] On October 16, 2009 the applicant's counsel, Ms. Lori O'Reilly, advised the respondent by fax that she has not received the CTR and would be filing a motion for remedies and costs by the following week. Mr. Rick Garvin, a solicitor for the respondent, states in his affidavit that he contacted Citizenship and Immigration Canada (CIC) on October 19, 2009 who informed him that an administrative error occurred in the processing of the Court's order which will result in the CTR being delivered late on October 20, 2009.

[20] Mr. Garvin advised the applicant's counsel by telephone on October 19, 2009 that the respondent would consent to a motion for an extension of time to file a further affidavit and to

adjust the requisite time periods in the order granting leave. Mr. Garvin states that that Ms. O'Reilly appeared satisfied with the arrangement.

[21] By oral directions dated October 29, 2009 Justice Russell of this court ordered that the CTR be accepted by the registry.

[22] Upon receipt of the CTR on October 20, 2009 the applicant compared its contents to a copy of the applicant's file obtained from Canada Border Services Agency (CBSA) on June 8, 2009 pursuant to a request under the *Privacy Act* 1980-81-82-83, c. 111, Sch. II "1". The applicant noticed some deficiencies in the CTR. Furthermore, along with the results of the *Privacy Act* request, the CBSA included a cover letter which stated that certain information has been removed from disclosure pursuant to sections 21, 26 and paragraph 22(1)(b) of the Act. The applicant took this letter as confirmation of his claim that Ms. Echreke has been in contact with CIC regarding his application.

The motion

[23] The applicant thereafter brought the motion now before the Court on November 12, 2009 seeking the following remedies:

> "a. an Order to set aside the decision of Immigration Officer, Guylaine Lasonde, dated April 8, 2009;
>
> b. a Directed Decision that the Applicant meets eligibility requirements to apply for permanent residence status as a member of the spouse or common-law partner in Canada class;

c. In the Alternative, if the above relief is not granted, an Order allowing the late submission of the Affidavit of the Applicant of this Motion, to be used in the underlying application for judicial review;

d. such further or alternative declaratory relief as counsel may advise and this Honourable Court may permit; and

e. an Order awarding costs on a solicitor-client basis, in the amount of $8,900.00."

[24] The applicant bases his motion on the following grounds:

"1. the Tribunal Record was provided late;

2. the Tribunal Record is incomplete;

3. the Respondent will not be prejudiced if the above relief is granted;

4. the Applicant has been prejudiced by the fact the Respondent has provided a late Tribunal Record, as the Tribunal Record was provided on October 20, 2009, and the Applicants further affidavit was to be served and filed on or before October 19, 2009. As a result, the Applicant could not file a further Affidavit; and

5. the Applicant will be greatly prejudiced if the above relief is not granted."

Applicant's submissions with respect to the motion

[25] The applicant submits that he is entitled to a remedy by virtue of the delay in producing the CTR, its incompleteness and poor quality, the respondent's conduct, and the prejudice that it has suffered from the Immigration Officer's reliance upon extrinsic evidence. The applicant submits that the CTR fails to account for materials which the Immigration Officer considered under the headings "items under consideration" and "factors supporting the marital bona fides". The applicant

relies on the Immigration Officer's affidavit where it is acknowledged that the aforementioned items could not be found in either the applicant's or his sponsor's files.

Respondent's submissions with respect to the motion

[26] The applicant submits that the late CTR cannot be accepted as such without the respondent bringing a motion to extend the relevant timeline for filing.

[27] The respondent submits that it offered to remedy the delay in the production of the CTR by consenting to a motion to extend the relevant timelines for filing a further affidavit. The poor quality of the CTR was due to rush in its preparation and consisted of a few replicated pages and two faded certificates of divorce which the respondent included as exhibits to the Immigration Officer's motion affidavit.

[28] The respondent submits that this Court ordered that the CTR be accepted for filing by the Registry pursuant to Justice Russell's oral directions. The respondent submits that there is no evidence to substantiate the applicant's allegations of intentional and improper conduct on the part of the CIC staff.

[29] According to the respondent the differences in the materials between the Privacy Act request and the CTR is irrelevant because they are produced for completely different purposes. The respondent notes the Immigration Officer's affidavit where she states at paragraph 2 that in arriving at the impugned decision no extrinsic information was relied upon. The respondent similarly relies

on the Immigration Officer's affidavit where it is stated that FOSS notes were only relied upon for background information and not for arriving at the final decision.

Court's analysis with respect to the motion

[30] In my view, this motion and its added expense could have been avoided had the parties chosen to communicate with each other after the production of the CTR. There was nothing stopping the applicant from contacting the respondent with its concerns regarding the deficiencies in the CTR. A little civility would have assuaged the applicant's concerns, and narrowed the contentious issues in this motion.

[31] However, I cannot accede to the respondent's suggestion that the applicant is entirely at fault. Instead of offering to proactively provide the applicant with darker and more readable copies of the applicant's and sponsor's divorce certificates, explaining why certain pages appear blank, and inquire as to the inability of CIC to locate certain portions of the record, the respondent chose to wait and correct the CTR's deficiencies only as a response to the applicant's motion.

[32] The respondent offered no satisfactory explanation for the inability of the Immigration Officer to locate portions of the record which were considered under the headings "items under consideration" and "factors supporting the marital *bona fides*".

[33] I accept the Immigration Officer's statement that the FOSS notes were only relied upon for background; however I am of the view that in "fact intensive" cases such as this, it is preferable to

err on the side of over inclusion. Even if the Immigration Officer relied on other evidence to arrive at the decision, it is apparent that some of the FOSS notes produced by the applicant have formed the factual background for some of the Immigration Officer's reasons, e.g. the officer found that the applicant and the sponsor represented their relationship differently according to whatever the application they pursued at the time. This information came from the FOSS notes.

[34] Retention by the applicant of the original copies of the materials that were subsequently lost by CIC minimized the prejudice to the applicant. However, retention of documentation is not a substitute for the tribunal's timely production of a complete CTR. I find that CIC did not provide the parties and this Court with a complete CTR. This defect was cured by the respondent's response to this motion and the applicant's filing of additional materials in support of its application for judicial review and motion. I cannot simply dismiss the motion under these circumstances.

[35] Having found that the CTR was incomplete, but that no intrinsic evidence was relied upon, this Court must decide upon the remedy.

Court's decision with respect to the motion

[36] It is trite law that failure to include documents in the CTR will not automatically lead to the quashing of the impugned decision unless the omitted documents were material to the decision: *Narcisse v. Canada (MCI)*, 2007 FC 514, per Justice O'Keefe at paras. 17-18. However, Justice Layden-Stevenson in *Li v. Canada (MCI)*, 2006 FC 498 held at paragraph 15 that Rule 17 of the Immigration Rules must be complied with:

> ¶15 …there is authority for the proposition that Rule 17 of the *Federal Court Immigration and Refugee Protection Rules*, SOR/93-22 is mandatory. The tribunal must prepare and produce a record containing all documents relevant to the matter that are in the possession or control of the tribunal. The decision may be set aside when the record is incomplete: *Gill v. Canada (Minister of Citizenship and Immigration)* (2003), 34 Imm. L.R. (3d) 29 (F.C); *Kong et al. v. Canada (Minister of Employment and Immigration)* (1994), 73 F.T.R. 204 (F.C.T.D.).

[37] The incompleteness of the CTR in this case did not involve any material items. There is some alarm with regard to the inability to locate several portions of the record but the decision as a whole did not rely on them. Much of what is missing in the CTR was found in the response to the *Privacy Act* request. This only forms the background to the application. In factually complex cases such as this, the background information cannot be neatly separated from the materials upon which the Immigration Officer directly relied upon in arriving at the decision. Background information is very relevant to the facts of this case, and should have been part of the CTR, but I cannot hold that this information was "material". I will not quash the Immigration Officer's decision on this basis alone.

[38] I will allow the late submission of the affidavit of the applicant of this motion and its exhibits, to be used in the underlying application for judicial review as a further affidavit. Considering that the respondent was initially forthcoming in its consent to the filing of this affidavit following the late production of the CTR, there was no need for this contentious motion on this issue.

[39] In terms of costs, the threshold for "special reasons" within the meaning of Rule 22 is high. In other words, in immigration litigation there is a “no costs” regime. Special reasons may exist where the Minister's conduct is "unfair, oppressive, improper or actuated by bad faith." See: *Uppal v. Canada (MCI)*, [2005] F.C.J. No. 1390 (QL) at paragraph 8 (QL). There was no malicious intent on the part of respondent or on the part of the applicant in bringing this motion. Inconvenience or moderate expense resulting from an unnecessary motion is not a special reason to award costs. Neither the applicant nor the respondent engaged in an abuse of process. I am therefore not prepared to award costs in these circumstances.

[40] This Court will therefore allow the applicant’s motion and grant leave to extend the deadline to file a further affidavit and immediately accept for filing the applicant’s motion affidavit and its exhibits as the application’s further affidavit.

[41] The issue with the late filing of the CTR and its incompleteness caused no prejudice to the applicant. Accordingly, no remedy or costs are warranted.

LEGISLATION

[42] Section 124 of the *Immigration and Refugee Protection Regulations* (IRPR) S.O.R./2002-227 sets out who is a member of the Spouse or Common-Law Partner in Canada Class:

124. A foreign national is a member of the spouse or common-law partner in Canada class if they	124. Fait partie de la catégorie des époux ou conjoints de fait au Canada l’étranger qui remplit les conditions suivantes :
(*a*) are the spouse or common-	

law partner of a sponsor and cohabit with that sponsor in Canada; (*b*) have temporary resident status in Canada; and (*c*) are the subject of a sponsorship application.	*a*) il est l'époux ou le conjoint de fait d'un répondant et vit avec ce répondant au Canada; *b*) il détient le statut de résident temporaire au Canada; *c*) une demande de parrainage a été déposée à son égard.

[43] Section 4 of the IRPR states that a foreign national will not be considered a spouse if the marriage was not genuine and was entered into primarily for the purpose of acquiring immigration status:

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.

[44] Rule 17 of the *Federal Courts Immigration and Refugee Protection Rules* (the "Immigration Rules") S.O.R./93-22 as amended by S.O.R./2002-232, s. 14, sets out the obligations of a tribunal to produce a certified tribunal record (CTR):

17. Upon receipt of an order under Rule 15, a tribunal shall, without delay, prepare a record containing the following, on consecutively numbered pages and in the following order:	17. Dès réception de l'ordonnance visée à la règle 15, le tribunal administratif constitue un dossier composé des pièces suivantes, disposées dans l'ordre suivant sur des pages numérotées

(*a*) the decision or order in respect of which the application for judicial review is made and the written reasons given therefor, (*b*) all papers relevant to the matter that are in the possession or control of the tribunal, (*c*) any affidavits, or other documents filed during any such hearing, and (*d*) a transcript, if any, of any oral testimony given during the hearing, giving rise to the decision or order or other matter that is the subject of the application for judicial review, and shall send a copy, duly certified by an appropriate officer to be correct, to each of the parties and two copies to the Registry.	consécutivement : *a*) la décision, l'ordonnance ou la mesure visée par la demande de contrôle judiciaire, ainsi que les motifs écrits y afférents; *b*) tous les documents pertinents qui sont en la possession ou sous la garde du tribunal administratif, *c*) les affidavits et autres documents déposés lors de l'audition, *d*) la transcription, s'il y a lieu, de tout témoignage donné de vive voix à l'audition qui a abouti à la décision, à l'ordonnance, à la mesure ou à la question visée par la demande de contrôle judiciaire, dont il envoie à chacune des parties une copie certifiée conforme par un fonctionnaire compétent et au greffe deux copies de ces documents.

[45] Rule 21(2) of the Immigration Rules allows the Court to vary time limits prescribed by the rules:

21(2) No time limit prescribed by these Rules may be varied except by order of a judge or prothonotary.	21(2) Les délais prévus aux présentes règles ne peuvent être modifiés que par ordonnance d'un juge ou d'un protonotaire.

[46] Rule 22 of the Immigration Rules allows the Court to grant costs for special reasons:

22. No costs shall be awarded to or payable by any	22. Sauf ordonnance contraire rendue par un juge

party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.	pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à desdépens.

APPLICATION ISSUES

[47] With respect to the merits of the application, the following issues have been raised by the applicant:

1. Did the Immigration Officer base her decision on erroneous finding of facts that she made in a perverse or capricious manner or without regard to the material before her particularly with respect to the following aspects of the decision:

    a. The Immigration Officer's assessment that there is little evidence that the applicant is in a genuine marriage and that it was not entered into primarily for the purpose of acquiring permanent resident status in Canada, was deficient in that she relied on misstated facts, assumptions, and irrelevant factors, and many of the reasons given are not founded in the evidence.

    b. The Immigration Officer only applied and analyzed one prong of the two-pronged test under section 4 of the IRPR.

2. Did the Immigration Officer breach the principles of natural justice by her insufficient reasons, failure to give reasons within a reasonable time, and alternatively failing to put before the applicant information from a third party complainant.

STANDARD OF REVIEW

[48] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain

whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see *also Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at paragraph 53.

[49] The applicant questions the adequacy of the reasons, which touches upon procedural fairness and therefore reviewable on a correctness standard of review: *Alexander v. Canada (MCI)*, 2006 FC 1147, [2006] 2 F.C.R. 681, per Justice Dawson at paragraph 24. Whether the Immigration Officer relied upon extrinsic evidence similarly touches upon procedural fairness: *Dios v. Canada (MCI)*, 2008 FC 1322, per Justice Russell at paragraph 23.

[50] It is clear that as a result of *Dunsmuir*, *supra* and *Khosa*, *supra*, at paragraph 58 that questions of the reasonableness of the Immigration Officer's decision with respect to the *bona fides* of the marriage are to be reviewed on a standard of reasonableness: see my decision in *Mustafa v. Canada (MCI)*, 2008 FC 564, at paragraphs 11-13; *Apaza v. Canada (MCI)*, 2006 FC 313, per Justice Heneghan at paragraph 10; and *Djeukoua v. Canada (MCI)*, 2006 FC 1213, per Justice Harrington at paragraph 12.

[51] In reviewing the Immigration Officer's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law:" *Dunsmuir*, *supra* at paragraph 47, *Khosa*, *supra*, at paragraph 59.

ANALYSIS

Issue No.1: Did the Immigration Officer err in failing to consider both prongs of the two-part test under section 4 of the IRPR and provide adequate reasons?

[52] The applicant submits that the Immigration Officer erred in failing to apply the second part of the two-part bad faith test under section 4 of the IRPR. The applicant bases this submission on the Immigration Officer's failure to provide an explanation as to how she reached the conclusion that the marriage was entered into primarily for the purposes of immigration. The applicant relies on this Court decision *Singh v. Canada (MCI)*, 2008 FC 673, where Justice Zinn at paragraph 18 quashed a decision that failed to state any reasons for concluding that a non-genuine marriage was entered into for the purpose of gaining status under the IRPA.

[53] The respondent submits that the Immigration Officer had immigration purposes in mind when she noted that the applicant's previous wife had also applied to sponsor him under the Spouse in Canada Class.

[54] In *Donkor v. Canada (MCI)*, 2006 FC 1089, Justice Mosely held at paragraphs 12 and 18 that section 4 of the IRPR should interpreted conjunctively:

> ¶12 The parties are in general agreement that section 4 of the Regulations must be read conjunctively, that is the questioned relationship must be both not genuine and entered into primarily for the purpose of acquiring any status or privilege under the Act. That would seem to follow from a plain reading of the enactment and is supported by several decisions of this Court: *Sanichara v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 1272, 2005 FC 1015 (at para. 16); *Singh v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 713, 2006 FC 565 (at para. 7).
> […]

> ¶18 It is clear that the test to be applied under the old regulation for determining whether a marriage was genuine was the time of the marriage itself. However, the new regulation does not state that this is the time at which the relationship is to be assessed. It speaks in the present tense for a determination of the genuineness of the relationship and in the past tense for assessing the purpose for which it was created. This seems to be consistent with the practice followed by Immigration Officers in assessing spousal sponsorship applications. It appears, from the cases which the Court has seen, that in interviews with claimants and their putative spouses the officers focus on whether there is a continuing relationship.

[55] In *Khan v. Canada (MCI)*, 2006 FC 1490, at paragraph 5 Justice Hughes held that since section 4 of the IRPR is comprised of a two-part test, a reviewable error on one prong of the test is sufficient to allow the Court to find that a reviewable error occurred in the application of the entire test. However, the applicant must bear the onus of demonstrating a reviewable error on at least one of the prongs.

[56] The Court in this case must decide whether there is an absence of reasoning behind the conclusion that the marriage was entered into primarily for the purpose of gaining immigration status and whether the applicant and this Court are left in doubt as to why the applicant was not successful in his application by the lack of reasoning: *Singh*, *supra*, at paragraph 20.

[57] Both the applicant's and sponsor's histories contain previous unsuccessful attempts at acquiring immigration status. The applicant tried to obtain status through a refugee claim and later through sponsorship. The sponsor made an unsuccessful application to sponsor her first husband. The Immigration Officer considered the evolution of the applicant's and sponsor's representation of their relationship in conjunction with the applicant's immigration efforts. It is apparent that the

Immigration Officer felt that the different representations of the couple's relationships, tailored to the specific immigration applications that they filed, indicated a desire on the part of the applicant to obtain status:

> With the evidence before me, it seems that along the years, PA and SP represented themselves as being solely friends or as being boyfriend and girlfriend, at their convenience and depending of the type of applications they were submitting. I place a lot of weight on that fluctuation in the presentation of their relationship status since it is shedding doubt on the applicant and the sponsor's credibility and marital bona fides.

[58] A fluctuating representation of a relationship to accommodate the demands of different immigration applications not only impugns the relationship's genuineness, but also leads to the instinctive inference that the relationship *per se* is for the purpose of obtaining immigration status. The immigration officer appeared to have made that inference and assigned to it great weight.

[59] The Court questions whether the immigration officer properly considered whether the marriage was genuine at the time of the interview on May 23, 2008, as opposed to the time the marriage was entered into in 2005. The couple now have a baby, have lived together for three years, have a business together, own a home together, have a mortgage together, have a credit card together and have bank accounts and utility accounts together. While the couple may have a lengthy history with immigration and while the husband may have been unfaithful, these factors do not necessarily affect the genuineness of the marriage at the time of the interview.

[60] For the reasons which follow, the Court does not need to decide this issue. In view of the Court's finding with respect to issue number 3, namely "did the ten and a half month delay between

the date of the interview and the date of the decision affect the applicant's rights of procedural fairness?"

Issue No.3: Did the Immigration Officer breach the duty of fairness?

[61] The applicant submits that a breach of procedural fairness occurred in the decision being made ten and a half months after the couple's interview with the Immigration Officer. The applicant submits that it is unfair to render a decision based entirely on memory and handwritten notes. The applicant further submits that the Immigration Officer did breach the duty of fairness by failing to state in her reasons whether or not information from a third party was received.

[62] For delay to breach procedural fairness in administrative cases it must cause prejudice which would compromise a party's ability to receive a fair hearing: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 at paragraph 121; *Dockstader v. Canada (MCI)*, 2008 FC 886, per Justice Simpson, at paragraph 38. An important factor in considering prejudice caused by delay is the reason for the delay.

[63] After the hearing the Court issued a Direction asking the respondent to provide reasons for the ten and a half month delay between the date that the immigration officer interviewed the applicant and his sponsor and the date when the immigration officer rendered her decision. The Court also sought information about whether the ten and a half month delay is longer than the nature of the process normally requires and whether the delay affects the applicant's right to a fair hearing in accordance with the rules of natural justice.

[64] After receiving representations from the parties, the Court must conclude that this ten and a half month delay does raise serious questions which would warrant the return of this matter for a new interview by another immigration officer for redetermination. As mentioned above, the Court questions whether the immigration officer properly considered the genuineness of the marriage at the date of the interview as opposed to the genuineness of the marriage at the time the marriage was entered into. When the decision was made, ten and a half months after the interview, it focused on the bona fides of the marriage at the time it was entered into, and did not analyze the present genuineness of the marriage at the time of the interview. The delay may explain this oversight.

[65] For this reason, the Court will allow this application, set aside the decision and refer the matter back to another immigration officer for redetermination.

CERTIFIED QUESTION

[66] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is allowed, the decision dated April 8, 2009 is set aside, and this matter is referred to another immigration officer for redetermination.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1936-09
STYLE OF CAUSE:	RAVI PRAKASH YADAV v. MCI
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	December 15, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	KELEN J.
DATED:	February 11, 2010

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