Federal Court		Cour fédérale

Date: 20100331

Docket: IMM-4886-09

Citation: 2010 FC 351

Ottawa, Ontario, March 31, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

FRITZNER JULIEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision dated September 10, 2009, by the Immigration Appeal Division of the Immigration and Refugee Board (the panel).

[2] The panel dismissed the appeal filed by the applicant of the refusal of the application for permanent residence in Canada in the family class made by his spouse, Raymonde Charles, under subsection 63(1) of the Act.

Factual background

[3] The applicant is a Canadian citizen born in Haiti. He arrived in Canada in 1980, sponsored by his first spouse, who died in 2005.

[4] The applicant's current spouse, Raymonde Charles, is a Haitian citizen who filed an application for permanent residence in Canada in the family class.

[5] The applicant knew Ms. Charles before he left Haiti for Canada. They began dating in 1968. Ms. Charles subsequently moved in with the applicant when she became pregnant in 1969. In 1971, they separated and Ms. Charles returned home with their son to live with her parents. At first they maintained contact, but towards the end of 1972, their contacts became limited to conversations about their son, who was born impaired.

[6] Around 1976 or 1977, the applicant met his first spouse, whom he married in 1979. After his departure for Canada in 1980, the applicant maintained contact with Ms. Charles and sent money to help support their son, and to help Ms. Charles set up a small business.

[7] The applicant made frequent trips to Haiti after his arrival in Canada and would meet Ms. Charles and their son on each visit. In 1989, the applicant returned to Haiti to get his son, whom he brought to Canada.

[8] In 2005, the applicant's first spouse died.

[9] In 2007, the applicant's mother died. The applicant returned to Haiti for his mother's funeral. During his stay he married Ms. Charles. Only four witnesses attended the wedding and no one else had been invited to the ceremony, not even Ms. Charles' four children living in Haiti, because the applicant was in mourning.

[10] After the wedding, the applicant returned to Haiti to visit Ms. Charles twice in 2008.

[11] On May 8, 2008, the application for permanent residence in Canada in the family class was refused by a visa officer, who was of the view that the marriage between the applicant and his spouse was a marriage described in section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), in that it was not genuine and was entered into primarily for the purpose of acquiring permanent residence in Canada. Moreover, neither Ms. Charles' identity nor that of her daughter had been established. The visa officer was not satisfied that the documents provided to prove the identities of the applicant's spouse and her daughter were genuine.

[12] The applicant appealed the visa officer's decision to the panel under subsection 63(1) of the Act. Two hearings were held before the panel: one on June 8, 2009, to hear the parties' testimony and another on June 15, 2009, for the parties' oral submissions.

[13] At the beginning of the hearing on June 8, 2009, the Minister's counsel advised the applicant of his concerns with regard to Ms. Charles' identity documents.

[14] On June 10, 2009, by way of a letter from his counsel, the applicant requested that the evidence be reopened and that the hearing scheduled for June 15, 2009, be postponed in order to grant him a reasonable amount of time to enable him to obtain a corrected document from the Haitian national archives to establish his spouse's identity.

[15] On June 11, 2009, the Minister's counsel objected to this request, stating that the evidence was closed.

[16] At the hearing of June 15, 2009, the panel rejected the applicant's request for adjournment.

[17] On September 10, 2009, the panel dismissed the applicant's appeal on the ground of the lack of proof of the identity of his spouse, Ms. Charles.

[18] The authenticity of the marriage is not in dispute in this judicial review.

Impugned decision

[19] In the panel's view, there was insufficient evidence to establish Raymonde Charles' identity, on a balance of probabilities. The panel also found that the relationship between the applicant and Ms. Charles was genuine and that the marriage had not been entered into primarily to allow Ms. Charles to acquire permanent residence in Canada. Ms. Charles does not fall within section 4 of the Regulations.

[20] Ms. Charles' identity was challenged, especially on the ground that her late declaration of birth filed by the applicant shows that it was allegedly made by Ms. Charles' father in 1999. Yet, Schedule 1 of Ms. Charles' application for permanent residence shows that her father died in 1994. The applicant testified that he had completed Schedule 1 himself and that he may have made an error. Furthermore, the certificate of attendance at the Temple filed by the applicant bears a registration number that does not match the registration number on the one first submitted.

Issues

[21] This application for judicial review raises the following issues:

1. Did the panel's refusal to reopen the evidence and, consequently, grant the applicant more time to produce fresh evidence with regard to Ms. Charles' identity constitute a breach of the principles of natural justice or procedural fairness?

2. Did the panel base its decision about Ms. Charles' identity on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it?

Relevant legislation

[22] *Immigration Appeal Division Rules*, SOR/2002-230:

Application to change the date or time of a proceeding	Demande de changement de la date ou de l'heure d'une procédure
48. (1) A party may make an application to the Division to change the date or time of a proceeding.	**48**. (1) Toute partie peut demander à la Section de changer la date ou l'heure d'une procédure.
Form and content of application	Forme et contenu de la

demande

(2) The party must

(2) La partie :

(*a*) follow rule 43, but is not required to give evidence in an affidavit or statutory declaration; and

a) fait sa demande selon la règle 43, mais n'a pas à y joindre d'affidavit ou de déclaration solennelle;

(*b*) give at least six dates, within the period specified by the Division, on which the party is available to start or continue the proceeding.

b) indique dans sa demande au moins six dates, comprises dans la période fixée par la Section, auxquelles elle est disponible pour commencer ou poursuivre la procédure.

Application received two days or less before proceeding
(3) If the party's application is received by the recipients two working days or less before the date of a proceeding, the party must appear at the proceeding and make the request orally.

Procédure dans deux jours ouvrables ou moins
(3) Dans le cas où les destinataires reçoivent la demande deux jours ouvrables ou moins avant la

Factors
(4) In deciding the application, the Division must consider any relevant factors, including

Éléments à considérer
(4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :

(*a*) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;

a) dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;

(*b*) when the party made the application;

b) le moment auquel la demande a été faite;

(*c*) the time the party has had to prepare for the proceeding;

c) le temps dont la partie a disposé pour se préparer;

(*d*) the efforts made by the party to be ready to start or continue the proceeding;	*d*) les efforts qu'elle a faits pour être prête à commencer ou à poursuivre la procédure;
(*e*) in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed in the absence of that information without causing an injustice;	*e*) dans le cas où la partie a besoin d'un délai supplémentaire pour obtenir des renseignements appuyant ses arguments, la possibilité d'aller de l'avant en l'absence de ces renseignements sans causer une injustice;
(*f*) the knowledge and experience of any counsel who represents the party;	*f*) dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil;
(*g*) any previous delays and the reasons for them;	*g*) tout report antérieur et sa justification;
(*h*) whether the time and date fixed for the proceeding were peremptory;	*h*) si la date et l'heure qui avaient été fixées étaient péremptoires;
(*i*) whether allowing the application would unreasonably delay the proceedings; and	*i*) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable;
(*j*) the nature and complexity of the matter to be heard.	*j*) la nature et la complexité de l'affaire.

Standard of review

[23] The Court agrees with the parties that the standard applicable to questions of law, of natural justice and of procedural fairness is correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Dhaliwal v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 296, 165 A.C.W.S. (3d) 888 at para. 36; *Canada (Minister of Public Safety and Emergency Preparedness) v. Philip*, 2007 FC 908, 160 A.C.W.S. (3d) 525).

[24] The assessment of the documentary evidence and of the testimony is a question of fact that involves the assessment of the applicant's evidence by the panel. The standard of review applicable to such questions of assessment of fact is reasonableness (*Dunsmuir*; *Thach v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 658, [2008] F.C.J. No. 834 (QL)).

1. Did the panel's refusal to reopen the evidence and, consequently, grant the applicant more time to produce fresh evidence with regard to Ms. Charles' identity constitute a breach of the principles of natural justice or procedural fairness?

[25] The applicant submits that the panel should have granted his request for an adjournment in order for him to have had the chance to produce additional evidence with regard to his spouse's identity since its misunderstanding about the reliability of the documents was based on an error by his counsel.

[26] The applicant further submits that in *Construction Gilles Paquette ltée v. Entreprises Végo ltée*, [1997] 2 S.C.R. 299, 212 N.R. 212 at paragraph 21, the Supreme Court of Canada found ''that a party must not be deprived of his rights on account of an error of counsel where it is possible to rectify the consequences of such error without injustice to the opposing party''. In *Phui v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 791, 115 A.C.W.S. (3d) 855, this Court found that an applicant should not be deprived of his or her rights by reason of an error by his or her own counsel.

[27] Lastly, the applicant claims that the document he sought to obtain during the adjournment could have changed the panel's findings with regard to Ms. Charles' identity, and that such an adjournment should have been granted in the interests of the administration of justice.

[28] The principle that there is no absolute right to an adjournment—since it is a discretionary power of the administrative tribunal—is well established (*Wagg v. Canada*, 2004 FCA 303, [2004] 1 F.C.R. 206 at para. 19; *Schurman v. Canada*, 2003 FCA 393, 315 N.R. 71; *Gearlen v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 874, 274 F.T.R. 303; *Hardware v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 338, 345 F.T.R. 1). When a tribunal refuses an adjournment, one must analyze the circumstances specific to each case in order to be able to determine if there was any breach of the principles of natural justice.

[29] In order to dispose of procedural issues, in particular an application for an adjournment and the reopening of the hearing, the panel must consider the factors listed in Rule 48(4) when making its decision. When dealing with procedural issues, the panel must also consider subsection 162(1) of the Act, which imposes an obligation of celerity. It is accepted law that administrative tribunals have the authority to control their procedure and to decide whether or not to grant an adjournment (*Siloch v. Canada (Minister of Employment and Immigration)*, (1993), 151 N.R. 76, 38 A.C.W.S. (3d) 570). The only requirement is that their decisions comply with the rules of fairness and natural justice (*Quindiagan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 769, 276 F.T.R. 88).

[30] The panel may consider Rule 48(4) factors that are relevant to the case in addition to any other relevant factors. However, this does not mean that the panel must expressly consider all of the factors set out in Rule 48(4) (*Gittens v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 373, 167 A.C.W.S. (3d) 139; *Hardware*).

[31] The Court notes that, in its analysis, the panel considered relevant factors when it made a decision on the applicant's request for adjournment, as follows:

a. The requested documents with regard to Ms. Charles' identity had been submitted in October 2008 (Rule 48(4)(*c*));
b. The applicant had ample time to make sure documents were submitted and to submit additional documents as needed (Rule 48(4)(*c*), (*d*) and (*i*));
c. The panel agreed to hear the applicant with regard to Ms. Charles' identity and held hearings to this effect on June 8 and 15, 2009;
d. Additional documents submitted on May 5, 2009, regarding the genuineness of the conjugal relationship did not pertain to Ms. Charles' identity (Rule 48(4)(*c*) and (*d*));
e. The Minister's counsel expressed to the applicant at the start of the hearing on June 8, 2009, that he had concerns regarding the documents related to Ms. Charles' identity;
f. The applicant is represented by competent counsel (Rule 48(4)(*f*)).

[32] The Court also notes that, in her letter of refusal dated May 8, 2008, the visa officer mentioned that she was not satisfied that the documents provided to prove Ms. Charles' identity

were genuine. The applicant should therefore have paid particular attention to the identity documents before the panel (Rule 48(*c*), (*d*), (*e*) and (*i*)).

[33] In this case, the Court therefore concludes that the panel considered the relevant factors in Rule 48(4) and rendered a reasonable decision after having considered all of the facts. The applicant had reasonable time to provide the documents and evidence needed in order to establish Ms. Charles' identity. The only justification presented by the applicant related to his lawyer in Haiti and the lawyer's lack of diligence in checking the documents. That explanation in no way establishes the applicant's claim that the panel acted unfairly or contrary to the principles of natural justice. The Court notes that the applicant has the onus of preparing his case adequately and that there was no reasonable justification for not having done so (*Yang v. Canada (Minister of Citizenship and Immigration)*, (2000), 101 A.C.W.S. (3d) 791, [2000] F.C.J. No. 1941 at para. 8 (QL)).

[34] Moreover, the evidence in the record does not satisfy this Court that verifications by the lawyer in Haiti would have been sufficient to correct the problems with the documents in question. Furthermore, it has not been established that the documents obtained would have changed the panel's finding (*Hardware* at para. 67).

[35] The applicant also argues that he should not be made to suffer for the procedural defect attributable solely to his counsel and that fairness required that an adjournment be granted. However, in *Moutisheva v. Canada (Minister of Employment and Immigration)*, (1993), 47

A.C.W.S. (3d) 684, 24 Imm. R.S. (2d) 212, the Federal Court of Appeal stated that the general rule is that counsel's conduct cannot be separated from that of the client:

> Finally, counsel for a party to a case is that party's agent. He acts on his behalf and as such assumes a number of obligations including those of conduct of the proceedings and receipt and issue of documents required by the proceedings.

[36] The panel could only set aside the decision of an administrative tribunal where mistakes were made by counsel who demonstrated ''extraordinary incompetence'' that resulted in a denial of natural justice (*Gogol v. Canada*, (1999), 95 A.C.W.S. (3d) 769, 2000 D.T.C. 6168 at para. 3; *Huynh v. Canada (Minister of Employment and Immigration*, (1993), 65 F.T.R. 11, 41 A.C.W.S. (3d) 696 at p. 15). In this case, the applicant has not established that his counsel had demonstrated extraordinary incompetence. The panel therefore did not commit an error in denying the applicant's request for an adjournment and, in this Court's opinion, there has been no breach of the principles of natural justice or procedural fairness.

2. Did the panel base its decision about Ms. Charles' identity on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it?

[37] It is the task of the trier of fact, in this case the panel, to weigh the documentary and testimonial evidence and to draw conclusions as to whether the evidence is sufficient to establish, on a balance of probabilities, Ms. Charles' identity. The Court must show great deference and it is not for the Court to substitute its own conclusions for those of the panel (*Thatch* at paras. 31-33; see also: *Morris v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 369, 147 A.C.W.S. (3d) 489 at para. 5; *Nguyen v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 709, 134

A.C.W.S. (3d) 885 at para. 7; *Froment v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1002, 299 F.T.R. 70).

[38] The Court notes that the applicant's testimony regarding Ms. Charles' identity was corroborated by his brother, Jean Deleix Julien, who testified at the hearing. Moreover, Violette Volcy and Gladys Charles both submitted statements confirming that they know Ms. Charles and that they were aware of the couple's past relationship and of the birth of their son. Furthermore, the birth certificate of the son of the applicant and Ms. Charles, issued at his birth, confirms the fact that the parties had been in a relationship more than forty years ago.

[39] In spite of this, substantial doubt remains, doubt that has not been addressed on the face of the record.

[40] In fact, the applicant's explanations in the transcript (pp. 488-490) provide no clear answer with regard to whether Mr. Charles Medixis (Ms. Charles' father) actually died in 1994 as Ms. Charles had indicated in her application for permanent residence, or whether, as documents 003783, 52612 and 765425 in the record show, Mr. Medixis apparently showed up in 1999 to make a declaration acknowledging his daughter's birth.

[41] Moreover, the panel noted that the applicant could have submitted additional evidence of Ms. Charles' identity before the appeal hearing. The panel also stated that Ms. Charles' testimony, her father's death certificate (in order to show that he was not dead when the declaration of birth

was made), or a DNA test, could have been submitted in support of Ms. Charles' identity and in answer to doubts that had been raised regarding her true identity. The applicant chose not to provide this evidence.

[42] At the hearing, counsel for the applicant argued that, in *Popal v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 532, 184 F.T.R. 161, the Court was sensitive to the situation in the applicant's country of origin, namely, Afghanistan, when it considered the identity documentation that the Minister had determined to be unsatisfactory. The Court notes however that, in that case, the passport had been issued on the basis of a Canadian document, whereas in this case there was still a doubt about the authenticity of a Haitian document that had been used as a basis for issuing the passport. Furthermore, in *Popal*, the officer had failed to provide any reasons, while in this case the panel provided written reasons (paras. 22-30) with regard to the issue of identity. The Court therefore finds that *Popal* does not apply in this case.

[43] The panel weighed all of the evidence in the record, including the applicant's testimony, his brother's testimony, as well as the letters from Violette Volcy and Gladys Charles. The panel also considered the birth certificate of the son of the applicant and Ms. Charles, Ms. Charles' passport and the certificates of attendance at the temple submitted in the appeal record and in Ms. Charles' permanent residence application package.

[44] However, the burden of proof rests on the applicant and, in light of the foregoing, the Court concludes that there remains significant doubt as to Ms. Charles' identity. The panel therefore

reasonably decided, on the balance of probabilities, that the applicant had failed to discharge his burden.

[45] This application for judicial review is hereby dismissed. No questions for certification were proposed by the parties and none arise from this matter.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question is certified.

''Richard Boivin''
Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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