

Federal Court



Cour fédérale

Date: 20100423

Docket: IMM-4559-09

Citation: 2010 FC 414

Ottawa, Ontario, April 23, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION
and**

**THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Applicants

and

BRUCE TIRER

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision by the Immigration Appeal Division of the Immigration and Refugee Board (the Board) dated August 27, 2009, wherein the Board allowed the respondent's appeal from a visa officer's decision to refuse the permanent residence application made by his spouse, Frida Cibrinovsky.

Factual Background

[2] The respondent, Bruce Tirer, is a 52 year old Canadian citizen who is a self-employed computing specialist. The respondent's wife, Frida Cibrinovsky, is a 62 year old Israeli citizen who lives in Israel.

[3] The respondent and Mrs. Cibrinovsky were married on May 14, 2005. This is the respondent's first marriage. The respondent's wife is divorced and she teaches music in Israel. Her daughter lives in Canada and her son lives in Israel. The respondent sponsored his wife's application for permanent residence to Canada.

[4] The visa officer interviewed the respondent's wife in Tel Aviv on January 2, 2007. The visa officer addressed various concerns at the interview, such as the little time the couple spent together prior to their marriage, the fact that the respondent never inquired about the status of his wife's application, the fact that the respondent's wife was unaware of significant details about her husband - e.g. if and when he moved, his current address, their wedding date or the names of his friends who attended the wedding. The officer also found there was insufficient evidence of an ongoing relationship and there were discrepancies on the application forms.

[5] On February 7, 2007, the visa officer concluded that Mrs. Cibrinovsky was a person described in section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) and that the marriage was not genuine and was entered into primarily for the purpose of acquiring a status or privilege under the Act. Mrs. Cibrinovsky therefore did not meet the

requirements for immigration to Canada as a member of the family class. Her application for permanent residence was refused. The reasons for the visa officer's decision were provided in the CAIPS interview notes.

[6] The respondent appealed the decision to the Board pursuant to subsection 63(1) of the Act. On August 27, 2009, the Board concluded that the relationship was genuine and had not been entered into primarily for the purpose of acquiring any status or privilege under the Act. Consequently, the Board allowed the appeal.

Impugned Decision

[7] The Board granted the appeal primarily for the reasons set out in paragraphs 9, 12 and 13 of its reasons. The Board acknowledged there were discrepancies between the appellant testimony and the answers given by the appellant at the interview in 2007 but found that the respondent's ability to explain the context of the interview notes was understandably limited because Mrs. Cibrinovsky was in Israel. Also, since both spouses agreed it was a simple wedding, the Board found the fact that Mrs. Cibrinovsky did not know the number of people who attended the wedding was not a major discrepancy. Lastly, given the couple spoke through web-based communications where telephone numbers are not used, the Board found it was understandable that Mrs. Cibrinovsky did not know the respondent's phone number.

Issues

[8] This application raises the following issues:

Did the Board err in concluding that the relationship was genuine and had not been entered into primarily for the purpose of acquiring any status or privilege under the Act? Did the Board fail to assess the credibility of the spouses or made findings of facts that were perverse or capricious?

Relevant Legislation

[9] Section 4 of the Regulations establishes that a foreign national shall not be considered a spouse of a person if the marriage is not genuine and if it was entered into primarily for the purpose of acquiring any status or privilege under the Act.

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.

Standard of Review

[10] Determining whether a marriage is genuine is a question of mixed fact and law as it involves applying the facts of the case to the requirements of the Regulations. Therefore, the appropriate standard of review is reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Khanna v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 335, 166 A.C.W.S.

(3d) 362; *Nadon v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 59, 158 A.C.W.S. (3d) 470).

[11] The assessment of credibility and weighing of the evidence fall within the jurisdiction of the administrative tribunal. The Court will only intervene if the Board based its decision on an erroneous finding of fact made in a perverse or capricious manner or if it made its decision without regard to the material before it (*Aguebor v. Canada (Minister of Employment and Immigration)*, (1993), 160 N.R. 315, 42 A.C.W.S. (3d) 886 (F.C.A.)). The applicable standard of review on credibility issues is reasonableness.

Analysis

[12] The language of section 4 of the Regulations requires that a marriage be both genuine and not entered into for the sake of gaining status under the Act. This Court has held that an administrative tribunal must comment on the evidence and information before it and explain why it rejected it, especially if it is central to the Board's determination of the issues (*Bains v. Canada (Minister of Employment and Immigration)*, (1993), 63 F.T.R. 312, 40 A.C.W.S. (3d) 657). The applicants submit the Board rejected the evidence contradicting the respondent's testimony without basis and the Board's reasons for rejecting this evidence is not supported by the material which was before it.

[13] From the outset, the Court notes that the visa officer identified major contradictions and credibility concerns in crucial responses by Mrs. Cibrinovsky at her interview with the officer which

took place at the Canadian Embassy. They constituted the main reason for his refusal and subsequently constituted the core issue in the appeal. This evidence was before the Board.

[14] More particularly, the record demonstrated that Mrs. Cibrinovsky had little or no knowledge of significant details of her spouse's life, of details regarding their wedding and, more particularly, of their wedding date. The visa officer found there was insufficient evidence of an ongoing relationship. The visa officer also found that the respondent had shown a serious lack of interest in his wife's application and in having her reside in Canada.

[15] The respondent alleges that the hearing before the Board is a *de novo* process and any deficiencies in the original sponsorship application can be addressed by the respondent or his wife. In the case at bar, the respondent asserts that the Board considered Mrs. Cibrinovsky's discrepancies in the context of the total testimony provided by the respondent. The respondent also submits the Board recognized that the fact his wife did not testify did not go to the heart of their relationship. The nature of the visa officer's reasons and concerns were such that the respondent could clarify the issues. According to the respondent, the applicants focus on issues identified by the Board as minor issues and, given the totality of the evidence, the Board's decision is reasonable.

[16] Despite the respondent's able argument, the Court disagrees.

[17] Although the Board raised the issue of discrepancies, the Court finds that the Board failed to conduct a proper analysis. Indeed, the visa officer's interview notes describe Mrs. Cibrinovsky's

lack of knowledge about the relationship in detail but the Board's decision only considered the respondent's knowledge of the relationship. The Board should also have considered Mrs. Cibrinovsky's knowledge of the relationship. Accordingly, the Board failed to address important material contradictions of the applicant, for instance, the number of guests who attended the wedding. Instead, the Board relied solely on the respondent's assertion and belief without testing the applicant's contradictions against relevant facts. The Board clearly ignored essential parts of the evidence before it and committed a reviewable error.

[18] Although Mrs. Cibrinovsky's credibility was in doubt after the hearing with the visa officer, she did not testify before the Board. In its reasons, the Board notes that Mrs. Cibrinovsky did not testify and, as such, discussion in terms of clarifying inconsistencies and contradictions was somewhat limited. The Board's reasons on this issue are set out at paragraph 9 of the Board's decision:

The Applicant [Appellant -Mr. Trier] testified at the hearing. The Applicant [Mrs. Cibrinovsky] did not testify. There was some discussion during the hearing of the contents of the transcript of the Applicant's interview at the Canadian Embassy in Israel in 2001. The Panel's opinion is that discussion of the content of these notes is constrained by the fact that the Applicant did not testify. As such, the Appellant's ability to explain the content of the interview notes is understandably limited. The Appellant testified that he and the Applicant met at a party in Canada in 2001. The Applicant was visiting family and friends. They got along well and spent time together for the rest of her visit to Canada. He testified that they kept in touch via telephone and the internet (by free-online calls through Skype and SlipStream).

[Emphasis added]

[19] While it is true that the respondent testified before the Board, the fact of the matter is that the Board failed to address the contradictory evidence more substantially and merely accepted the

respondent's testimony at face value. The Board did not test its findings against the relevant facts and relevant objective evidence. (*Canada (Minister of Citizenship and Immigration) v. Heera*, [1994] F.C.L. No. 1594 (QL)).

[20] In these circumstances, the Court is of the view that the Board erred in assessing the genuineness of the relationship only through the respondent's version of events or intentions and by disregarding Mrs. Cibrinovsky's intentions and contradictory testimony.

[21] Hence, the Court concludes that the Board's findings are unreasonable as it failed to consider contradictory evidence and to assess the credibility issue. This constitutes a reviewable error (*Canada (Minister of Citizenship and Immigration) v. Nyari*, 2002 FCT 979, 117 A.C.W.S. (3d) 607; *Canada (Minister of Citizenship and Immigration) v. Champagne*, 2008 FC 221, 164 A.C.W.S. (3d) 857).

[22] For these reasons, the application for judicial review is allowed. There is no certified question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed;
2. The matter is to be referred back to the Board for re-determination by other members;
3. No question is certified.

“Richard Boivin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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Bruce Tirer

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