Federal Court Cour fédérale

Date: 20111103

Docket: IMM-676-11

Citation: 2011 FC 1258

Ottawa, Ontario, November 3, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

MATTHEW L.L. ENRIGHT

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 of the Immigration and Refugee Board, Immigration Appeal Division (the Board) rendered on January 19, 2011. The Board determined that the appeal concerning the sponsored application for permanent residence of Mr. Matthew L.L. Enright's (the Applicant) partner, Ms. Natalia Kuryashkina (Applicant's Partner), is dismissed as she did not qualify under section 4 of the *Immigration and Refugee Protection Regulations*, SOR/ 2002-27 [*IRPR*] as a member of the family class pursuant to section 12(1) of the *Immigration and Refugee Protection Act* (SC 2001, c 27) [*IRPA*].

[2] For the reasons that follow, this application for judicial review is allowed.

I. Facts

[3] The Applicant is a Canadian businessman and the father of one adult son from a previous marriage.

[4] Ms. Kuryashkina is a Russian citizen with university degrees in biology and chemistry. She wanted to live in Canada because she felt it was the best country in the world.

[5] In 1998, she was invited to Canada by a Canadian citizen through an advertisement she had placed in an international newspaper for encounters. Her Canadian correspondent had told her to apply for a tourist visa at the Canadian Embassy; she did but was refused.

[6] Two years later she was able to obtain a visa for the United States of America [USA]. She travelled to New York and then decided to come to Canada. At the Canadian border she was refused but told she could file an application for refugee status which she did. That application was refused.

[7] During that time, she married a permanent resident of Canada to whom she had been introduced by someone from the Russian community. Ms. Kuryashkina was married in December of 2000.

[8] Ms. Kuryashkina's husband applied to sponsor her application for permanent residence in Canada. However, he became abusive and violent and she decided to end the relationship. The husband withdrew his sponsorship application around May 2002 and they were divorced in 2003.

[9] In August 2002, Ms. Kuryashkina applied for residence in Canada on Humanitarian and Compassionate grounds [H&C] and she was issued a temporary work permit while her application was being processed. Her H&C application was refused. She was told to leave Canada by October 30, 2003.

[10] She did not leave Canada as ordered on the advice of a lawyer who told her he could get ministerial consent for her to stay. Although this lawyer repeatedly asked her for money, he failed to handle her case and obtain the ministerial stay. A complaint was filed by Ms. Kuryashkina to the "Barreau du Québec" (Bar of the Province of Quebec) against the lawyer. The complaint is still pending.

[11] On the advice of another lawyer and her secretary, she did not disclose any change of address to Canadian Immigration authorities and used a false name on her mailbox. A complaint was filed by Ms. Kuryashkina to the "Barreau du Québec" (Bar of the Province of Quebec), against that second lawyer. The complaint is still pending.

[12] On October 31, 2003, a warrant for Ms. Kuryashkina's arrest was issued by Immigration authorities.

[13] In August 2004, Ms. Kuryashkina met the Applicant in a grocery store. A few weeks later, they started seeing each other. In mid-September they decided that Ms. Kuryashkina should move in with the Applicant.

[14] The Applicant found out around Christmas of 2004 that Ms. Kuryashkina was without status in Canada.

[15] While Ms. Kuryashkina was staying with the Applicant, she made weekly visits to her apartment to make sure everything was in order.

[16] On February 9, 2005 during one of her regular visits she was arrested and detained by the Canadian Immigration authorities until her removal to the USA.

[17] Ms. Kuryashkina lived in the USA from February to September 2005. The Applicant came to visit her on week-ends and sometimes on week days. He paid all her expenses during her stay in the USA.

[18] Ms. Kuryashkina also applied for a new Russian passport during a trip to New York as her Russian passport was expired.

[19] In September 2005, the Applicant and Ms. Kuryashkina came back to Canada. The Applicant did not know that Ms. Kuryashkina needed authorization to come back to Canada. After

their return to Canada, Ms. Kuryashkina lived with the Applicant until her departure on August 28, 2006.

[20] During that time, Ms. Kuryashkina filed an application for permanent residence in Canada. The application was denied in June 2006. She submitted a new application for permanent residence in Canada from Russia, on November 9, 2006. The application was again refused. The refusal was the subject of an appeal before the Board.

[21] The Board found that the Applicant had not established on a balance of probabilities that Ms. Kuryashkina was his common law spouse or conjugal partner and that their relationship was genuine. The Board also concluded that Ms. Kuryashkina's primary intention in entering into a relationship with the Applicant was to obtain permanent residence in Canada. Consequently, the Board decided that Ms. Kuryashkina was not a member of the family class for the purpose of the application of the *IRPA* and the *IRPR*.

II. Legislation

[22] Section 12(1) of the *IRPA* and section 4(1) of the *IRPR*:

> Family reunification
>
> **12.** (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.

Bad faith

4. (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership

*(*a*)* was entered into primarily for the purpose of acquiring any status or privilege under the Act; or

*(*b*)* is not genuine.

III. Issue and Standard of Review

A. Issue

- ***Did the Board err in determining that Ms. Kuryashkina was not qualified under section 4 of the IRPR as a member of the family class pursuant to section 12(1) of the IRPA?***

B. Standard of Review

[23] Determining the *bona fides* of a relationship and the nature of it for the purposes of section 4 of the *IRPR* is mainly factual and is therefore reviewable against a standard of reasonableness (*Kaur v Canada (Minister of Citizenship and Immigration)* 2010 FC 417, [2010] FCJ No 482 at para14; *Zheng v Canada (Minister of Citizenship and Immigration)*, 2011 FC 432, [2011] FCJ No 544 at para 18, [*Zheng*]).

IV. Parties' submissions

A. Applicant's submissions

[24] The Applicant submits that the Board based part of its decision more on the history of Ms. Kuryashkina's stay in Canada than on the actual merits of the application.

[25] The Applicant also claims that Ms. Kuryashkina received inappropriate advice from different lawyers but since he has been involved, the immigration problem has been dealt with in a proper and legal manner.

[26] When Ms. Kuryashkina was removed to the USA, the Applicant paid for all her expenses, this undisputed fact, amongst others, attests to the authenticity of their relationship.

[27] The Applicant submits that when they returned to Canada, he was not aware that Ms. Kuryashkina could not be allowed in this country without ministerial consent.

[28] The Applicant argues that he continuously lived with Ms. Kuryashkina in Canada from September 2004 until February 2005 and from September 2005 until August 2006. The Applicant also visited her, on a weekly basis, in the USA, from February 2005 until September 2005. According to the Applicant, their continued relationship amounts to close to two years. The Applicant alleges that this constitutes evidence of a conjugal relationship.

[29] As for the pictures in the record, the Applicant argues that he could have provided the Board with other pictures. However, the Board did not confront or press the Applicant on this issue.

[30] The Board usually considers known criteria to assess the authenticity of a relationship. The Applicant claims to satisfy these requirements He claims that the Board properly referenced the decision in *Chavez v Canada (Minister of Citizenship and Immigration)*, [2005] IADD No 353, but never applied the criteria specified therein to the case at bar.

[31] The Applicant submits that Ms. Kuryashkina's intentions were honest and that she did not want to stay in Canada at any cost.

[32] He further argues that the Board based its decision on facts and opinions which are not part of the record.

[33] According to the Applicant, the Board made several errors and if the Board had properly considered the application, it would have concluded, on a balance of probabilities, in favour of the Applicant (*Glen v Canada (Minister of Citizenship and Immigration)*, 2009 FC 479, [2009] FCJ No 565 at paras 3, 4, 9, 10 and 11).

B. Respondent's submissions

[34] The Respondent submits that the test under section 4 of the *IRPR* has two prongs. To succeed before the IAD the appellant must prove, on a balance of probabilities, that the relationship

was not entered into primarily for the purpose of acquiring status under the *IRPA* and that it is genuine.

[35] The Respondent also submits that the Board is entitled to examine certain contextual factors, including prior attempts to obtain status in Canada.

[36] The Respondent also argues that the Board is assumed to have considered all the evidence in coming to its decision. Its decision must be interpreted as a whole (*Khera v Canada (Minister of Citizenship and Immigration)*, 2007 FC 632, [2007] FCJ No 886 at para 7 [*Khera*]). The Board was entitled to consider the evidence as a whole and to assign more weight to certain facts that suggested that Ms. Kuryashkina was more likely to engage in a relationship primarily to obtain status in Canada.

[37] The Respondent submits that, following its assessment of the evidence, the Board concluded that there was insufficient evidence, on a balance of probabilities, to establish that the Applicant and Ms. Kuryashkina were engaged in a conjugal relationship. Very little evidence was adduced before the Board and this explains the Board's finding that the Applicant and Ms. Kuryashkina were not engaged in a conjugal relationship.

[38] The Board having found serious credibility issues and having concluded that the relationship is not genuine, the Respondent alleges that these findings are sufficient to dispose of the application for judicial review.

V. Analysis

[39] Justice Near writes at paragraph 20 of *Zheng*:

> Subsection 12(1) of the *IRPA* indicates that a foreign national may be selected as a member of the family class on the basis of their relationship as the spouse of a Canadian citizen or permanent resident. However, section 4 of the *IRPR* outlines the conditions under which a foreign national will not be considered a spouse.

He also adds, at paragraph 21:

> …
> the Applicant had the burden of proving, on a balance of probabilities, either that his relationship to Ms. Huang was genuine, or that it was not entered into primarily for the purpose of acquiring any status or privilege under the *IRPA*. That is to say, in order for his marriage to Ms. Huang to fall outside the scope of the section 4 exclusion, he was required to demonstrate that one of the two conditions set out in section 4 was not satisfied.

[40] The Board is not bound by a specific test in order to determine if a relationship is genuine or not. The Board cannot be faulted if it considers a different set of criteria (*Ouk* v *Canada (Minister of Citizenship and Immigration)*, 2007 FC 891, [2007] FCJ No 1157 at para 13; *Khera* cited above).

[41] The Board admitted that there was evidence of a relationship for more than one year before the application. But it concluded that the relationship was not genuine.

[42] The Board also relied on the case *M v H*, [1999] 2 SCR 3 at para 59, which lists a number of factors indicative of a conjugal relationship including “shared shelter, sexual and personal behavior, services, social activities, economic support and children, as well as the societal perception of the couple”. In the present case, there was evidence that the Applicant and Ms. Kuryashkina lived

continuously under the same roof from late September 2004 until February 2005 and from September 2005 until August 2006.

[43] There is also evidence of financial support from the Applicant to Ms. Kuryashkina. The Applicant spent a total of 33,438.67 $ on behalf of Ms. Kuryashkina and sent her money when she needed it on a number of occasions even after she left for Russia in August of 2006. There is also evidence of a joint bank account and pictures of Ms. Kuryashkina with the Applicant's mother.

[44] The Applicant's record contains letters of friends and family stating they have met him with Ms. Kuryashkina. Several phone bills totalling more than 5, 950 minutes of conversation when she was in the United States from February 2005 to September 2005 and hotel bills for the same period.

[45] The Board found that the immigration history of Ms. Kuryashkina was an important factor in assessing the genuineness of her relationship with the Applicant. The Court agrees that Ms. Kuryashkina's immigration history was pertinent. The Court has some concerns with respect to the treatment of part of the evidence that was adduced by the Applicant to explain Ms. Kuryashkina's failure to comply with the law. The Applicant clearly established that Ms. Kuryashkina received and followed bad advice from different counsels, and filed documents establishing that the Bar was investigating the complaints against two different lawyers who represented her. The major part of Ms. Kuryashkina's negative immigration history can be explained by the bad advice received. The Board nonetheless concluded that the Ms. Kuryashkina is an educated woman and that she did not leave Canada when told to do so in October of 2003. She failed to disclose her change of address to the Canadian immigration authorities and used a false name on her mailbox. She also leased her

apartment on Walkley Street under a false name and returned to Canada without the required ministerial consent. The Board found that, on a balance of probabilities, she followed the bad advice she received knowing that she was not abiding by the law because she wanted to stay in Canada at any means. This conclusion runs counter to some of the evidence adduced by Ms. Kuryashkina and suggests that she knew the inner workings of Canadian immigration legislation and should have rejected the advice of trained legal counsels she hired. The Court cannot accept such reasoning.

[46] The Board concluded that there was very little evidence of social activities together, very little evidence of societal perception and very few pictures (paras 19-22 of the Board's decision). The Court also finds this assessment to be questionable in view of the testimony provided by both Applicant and Ms. Kuryashkina. The degree of shared social activities will depend in large part on the mutual interests of a couple. When questioned to that effect it is clear from the record that, as a couple, the Applicant and Ms. Kuryashkina lead a quiet life.

[47] The Applicant and Ms. Kuryashkina made a few trips to Buffalo and New York and spent a lot of time in a distant relationship. Yet the Board ignores the fact that Applicant claims to have spent 3,634 minutes during 1,031 calls to Russia between August 2006 and September 30th 2010 on the basis that no clear evidence was adduced of Ms. Kuryashkina's phone number in Russia. More importantly, the Board underlines the fact that the Applicant has not seen Ms. Kuryashkina once since she was removed in 2006, and finds that this and all its other concerns are not indicative of a genuine relationship. Yet the Applicant has provided medical evidence explaining his fear of flying. He has undergone treatment to surmount that fear since he met Ms. Kuryashkina and that travel by

other means would take at least six weeks, time which he cannot afford being a self-employed businessman.

[48] Evidence that the lease for the Walkley Street apartment was effective September 1st but that she moved in later in September, with Applicant, was misconstrued.

[49] The Court finds that other evidence presented by the Applicant was either ignored or misconstrued. Evidence of the existence of a joint bank account was presented. Evidence that Ms. Kuryashkina was the victim of violence at the hand of her first husband was ignored or rejected without explanation. The evidence presented was important since it established the authenticity of the relationship and sought to demonstrate that Ms. Kuryashkina did not want to stay in Canada at any cost. “[T]he more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact “without regard to the evidence”” (*Cepeda-Gutierrez v Canada (Minister of citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35 at para 17).

[50] It is this accumulation of either ignoring parts of the evidence presented or failing to explain why it was not acceptable to the panel that brings this Court to the conclusion that the application for judicial review should be allowed.

[51] Although this Court may have arrived at the same conclusion as the panel, it is not its role to re-weigh the evidence but to ensure that in coming to its decision, the panel did consider all the evidence presented. The decision reached by the Board needed to be transparent and thorough. It

therefore fails the test established by our Supreme Court (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

VI. Conclusion

[52] The Board's decision is unreasonable. As such, this application for judicial review is allowed and a new hearing is ordered.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and a new hearing is ordered.

2. There is no question of general interest to certify.

"André F.J. Scott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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