

Federal Court



Cour fédérale

**Date: 20121029**

**Docket: IMM-1459-12**

**Citation: 2012 FC 1251**

**Toronto, Ontario, October 29, 2012**

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

**BETWEEN:**

**SANDRA YEOTELY LARYEA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] The present Application is a review of a Decision of the Immigration Appeal Division (IAD) on an appeal brought to it by Ms. Laryea, a Canadian citizen, with respect to the rejection by a visa officer of her sponsorship of the permanent residence application of her husband, Theophilus Tettey Sarpei, a citizen of Ghana. The issue before the visa officer was whether the evidentiary burden had been discharged to prove that Ms. Laryea's and Mr. Sarpei's marriage was genuine and not entered into primarily for acquiring immigration status for Mr. Sarpei.

[2] On the basis of a negative finding of credibility, the visa officer rejected Mr. Sarpei application. A primary feature of this finding was that Mr. Sarpei did not answer as expected to questions with respect to his knowledge of his wife's continuing relationship with the father of her children that she brought into the marriage.

[3] In reaching the Decision presently under review, the IAD fully considered the evidence before the visa officer and the visa officer's conclusion on the evidence. The IAD heard extensive evidence from Ms. Laryea about the relationship leading to the marriage, however, Mr. Sarpei was not called to give evidence at the hearing. Thus, the only evidence from him before the IAD was that given to the visa officer. However, under direct questioning by the Hearings Officer for an explanation of her husband's conduct before the visa officer, Ms. Laryea gave detailed evidence in response.

[4] In the result, the IAD found that Mr. Sarpei should have been able to answer the visa officer's questions, and because Ms. Laryea did not call him to testify on the appeal to answer those same questions, the IAD drew an adverse inference with respect to Ms. Sarpei's absence. This finding ultimately resulted in a rejection of the appeal.

[5] The issue for determination is whether the IAD erred in drawing the adverse inference.

**I. The Evidentiary Context with Respect to the Relationship**

[6] In paragraphs 14 to 19 of the Decision the IAD describes the factual context with respect to the issue for determination:

At the hearing, the Appellant described the development of her relationship with the Applicant. Her evidence in this regard is as follows: the Appellant and Applicant are distantly related to each other and shared a close friendship with each other during childhood; the Appellant lost contact with the Applicant for a couple of years after her immigration to Canada in 1991 but their mothers continued to communicate with each other by telephone; the Appellant visited Ghana in 1999 and reconnected with the Applicant during this trip; the Appellant financed the Applicant's university education, which he completed in 2005; and sometime in 2005 to 2006, the Applicant advised the Appellant that he had romantic feelings for her. The Appellant testified that she jokingly discussed the possibility of marriage with the Applicant in 2006, after her relationship with her former boyfriend had ended and she was having difficulty raising her eldest son as a single parent. The Appellant further stated that she began to take the Applicant's romantic interest in her more seriously in 2007 and decided to marry the Applicant at this point. The Appellant testified that she and the Applicant participated in a customary wedding celebration on May 15, 2008 and that they entered into a civil marriage on May 22, 2008.

There is ample evidence in this case to support the Appellant's testimony that she and the Applicant had a close emotional relationship prior to marriage. Counsel for the Minister conceded in his submissions that the Appellant and Applicant do have a relationship together but he contends that this relationship is one more similar to that between siblings. The panel accepts that the Appellant and Applicant are related to each other distantly and that they share a close emotional bond together. The issue in this case remains whether the Appellant and Applicant's marriage is genuine and was not entered into primarily for the purposes of facilitating the immigration of a close friend or family member, being the Applicant.

The Appellant gave birth to her youngest son in February 2008 and she testified that both of her children have the same father. The Appellant's evidence is that her relationship with her former boyfriend ended in 2006 but that she maintained a similar social circle with him. The Appellant stated that, in 2007, she attended a birthday party that was also attended by her former boyfriend and that she ended up having sexual relations with him during that night. She stated that this incident was casual in nature and indicated that this was an isolated event. The Appellant testified that her pregnancy with her youngest child resulted from this night and that the Applicant was upset with her when she told him about the incident. The Appellant explained that the Applicant ultimately forgave her

prior to the birth of her youngest son and that they resumed their plans for marriage.

The Appellant's evidence is that she made plans for her wedding to occur in May 2008 and that she had sent a number of items to Ghana for the purposes of her wedding festivities. The Appellant stated that her wedding plans were interrupted by the death of a close family member and that all of the items that she had sent to Ghana for her wedding were used for the funeral rites. She stated that, once she was in Ghana in May 2008, she suggested to the Applicant that they should still marry on the planned date and that they held a simple wedding celebration.

At the interview, the visa officer questioned the Applicant regarding the Appellant's relationship with the father of her youngest child." The Applicant informed the visa officer that he had asked the Appellant why her relationship with the father of her child had broken down but that she would not tell him. The visa officer asked the Applicant whether the Appellant still saw the father of her child and, in response, the Applicant advised the visa officer that he did not know. The visa officer concluded that the Applicant had little knowledge of the Appellant's life.

The Applicant did not testify at the hearing. According to the Appellant, the Applicant is employed as a deputy postal manager and was on assignment in the northern part of Ghana on the day of the hearing. The Appellant stated that the Applicant was not accessible to telephone signals in this part of Ghana and that he could not make alternative arrangements to testify at the hearing because of his work duties. Counsel for the Minister argued that the Applicant should have been made available for testimony since he was given advanced notice of the hearing date. Further, counsel for the Minister noted that a request for an adjournment of the hearing was not made by the Appellant so that she could be given another opportunity to call the Applicant as a witness.

[7] During the course of the hearing the Hearings Officer closely questioned Ms. Laryea as to why Mr. Sarpei responded as he did to the visa officer's questioning about their relationship. Her answers were detailed and based on her knowledge of her husband acquired before the interview with the visa officer, and after the interview arising from her conversations with her husband. Two main explanations emerged from the questioning which are documented in the transcript of the

hearing before the IAD. First, the birth of Ms. Laryea's second child was a very sensitive topic for Mr. Sarpei, and he simply could not and would not discuss it with the visa officer: "he probably already shut down" and "he just clamed up" (Transcript, pp. 42 – 43) and "it was ...uncomfortable memory for him" (Transcript, p. 52). And second, for Mr. Sarpei, it is culturally inappropriate to discuss such private matters with a stranger even if she is in a powerful position: "its just in our culture...you don't exhibit your dirty laundry...we are raised a certain way", and "it isn't something that comes easily, discussing your dirty laundry with a stranger, even if she is the Immigration" (Transcript, p. 52).

## **II. The Adverse Inference Finding**

### **A. *Breach of the duty of fairness***

[8] The IAD's adverse inference finding is stated in paragraph 23 of the Decision:

In this case, there is critical information that only the Applicant could speak to in testimony. The Appellant had a sexual relationship with her former boyfriend during the purported time of her romantic relationship with the Applicant and a child was born from her sexual encounter with her former boyfriend, just three months before her marriage to the Applicant. The visa officer noted as a concern that the Applicant failed to illustrate how the Appellant's relationship with the father of her two children fit into the progression of his relationship with the Appellant and, according to the information that the Applicant provided to the visa officer, the Applicant did not know whether the Appellant saw the father of her children. The Appellant described the events surrounding her relationship with her former boyfriend and she testified that the Applicant ultimately forgave her for her sexual liaison with her former boyfriend. She further stated that the Appellant did not provide these details to the visa officer at the interview because he probably "shutdown" due to his bad memories related to the Appellant's sexual relationship with her former boyfriend in 2007 (when the Appellant's youngest child was conceived). The timing of events is important in understanding the development of the Appellant and Applicant's relationship up to the point of marriage in May 2008 and the Applicant should have explained why he did not provide details to the visa officer when

given the opportunity to do so at the interview. Also of importance in this case is the Applicant's own testimony regarding his motivations for entering into marriage with the Appellant in May 2008. The panel draws a negative inference from the Applicant's failure to be called and address these concerns.

[Emphasis added]

[9] It is clear that, regardless of the undisputed evidence that Mr. Sarpie was not available to appear before the IAD on the date of the hearing, the fact that Ms. Laryea did not ask for an adjournment lead to the adverse inference finding. In the course of argument before the IAD, Counsel for Ms. Laryea explained that an adjournment was not requested for the following reasons:

Now, the Appellant ... the Applicant is not here to testify. We couldn't get him to testify. Madam Member, you've heard the circumstances surrounding his employment and that he's in some part of the country, Ghana, where phone reception's very ... more or less, very difficult to go through. Yes, we had the opportunity to have had this case carried on to another date. Sandra, Madam Member, the Appellant and the Applicant, both of them have been waiting over two years to have this case heard today, over two years. This had been canvassed with my client, and the response was, "No, no. I want this case done, done with today. Done." Yes. This is ... this is how much she wants her husband here. So there ... the fact that we didn't get the Applicant to testify today, Madam Member, it's very troubling for us to draw a negative ... a negative inference on that, to shed doubt or to undermine the credibility of the evidence before you. Sandra, the Appli ... the Appellant has responded to all the concerns that have I been raised in the record. And there isn't much anyways. She has adequately ... the Appellant has adequately responded to the concerns, the problems that arise in the record.

(Transcript p. 65)

[10] There is no evidence on the record before the IAD to raise a suspicion that Mr. Sarpei was unavailable in order to avoid testifying. In any event, it is apparent from the IAD's reasons that such a suspicion was active in rendering the decision. In my opinion, for the IAD to not have given notice of such a suspicion on the facts of the present case was unfair. Notice should have been given

to Ms. Laryea before the decision was rendered that, without Mr. Sarpei presenting himself for examination with respect to what transpired before the visa officer, the appeal would be dismissed. In my opinion, to not provide Ms. Laryea with an opportunity to reconsider applying for an adjournment to allow Mr. Sarpei an opportunity to allay the IAD's suspicion constitutes a breach of the duty of fairness.

[11] The failure to communicate to Ms. Laryea that the testimony of Mr. Sarpei would be required is especially unfair in circumstances where, as here, the IAD provided no reasons for disregarding Ms. Laryea's apparently credible and un-contradicted evidence on the question of why Mr. Sarpei answered as he did.

[12] In the decision in *Mann v Canada (Minister of Citizenship and Immigration)*, 2005 CanLII 56894 (IRB), IAD Member Stein states that that in many cases, the testimony of the appellant alone can suffice to persuade the panel of the *bona fides* of the intentions of both the appellant and the applicant.

[13] However, as stated in *Mann*, in some circumstances – such as where there is an obvious reason to question the motivations of the applicant because there is persuasive evidence that the applicant is using the appellant to acquire status in Canada – it might be advisable or even necessary to call the applicant as a witness to alleviate such concerns. Nevertheless, the decision at paragraph 15 makes it clear that even in such circumstances, an adverse inference finding does not necessarily follow:

However, in some cases, even where the above problems exist, the appellant alone may be able to persuasively explain the problem. The

decision whether to call the applicant as a witness is individual to each appeal and in the view of the panel, should be based on the quality of the available other evidence in its entirety. As noted above, even where one of the above circumstances exists, the testimony of the appellant alone may suffice to discharge the evidentiary burden.

[14] In the present case, with respect to the issues the IAD found to be of the greatest concern, it placed little to no weight on Ms. Laryea's testimony. As Mr. Etienne, Counsel for Ms. Laryea analogized during the course of the hearing, the IAD seemed to be of the mind that "it doesn't matter how pure the Pope is, I have to hear it from the Lord." I agree with the point made that such a position disregards the relaxed rules of evidence approach accepted by the IAD and sends a confusing message to appellants as to whether or not one voice can really speak for two.

[15] Therefore, given the breach of fairness as found, the Decision must be set aside. However, I am of the view that the redetermination can be on the basis of the existing record, but with the opportunity for further evidence to be provided.



**ORDER**

**THIS COURT ORDERS that** the decision under review is set aside and the matter is referred back for redetermination on the following directions:

1. The redetermination be conducted on the basis of the existing evidentiary record, but with liberty to both the Applicant and Respondent to supply further evidence; and
2. With respect to any evidence to be provided by Mr. Serpei, if he is unavailable to testify in person on the redetermination, his testimony is to be taken by either teleconference or videoconference at a time when Mr. Serpei confirms that he is available.

There is no question to certify.

“Douglas R. Campbell”

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Judge

Federal Court



Cour fédérale

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-1459-12

**STYLE OF CAUSE:** SANDRA YEOTELY LARYEA V THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 18, 2012

**REASONS FOR ORDER AND  
ORDER BY:** CAMPBELL J.

**DATED:** OCTOBER 29, 2012

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