Federal Court  Cour fédérale

Date: 20131125

Docket: IMM-11015-12

Citation: 2013 FC 1182

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 25, 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

Laurent VILLENEUVE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Laurent Villeneuve, the respondent, was successful before the Immigration Appeal Division of the Immigration and Refugee Board (the panel) in his appeal under subsection 63(1) of

the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) from the refusal of an application for permanent residence in Canada as a member of the family class. This application was made by his conjugal partner, an Algerian citizen.

[2] The Minister of Citizenship and Immigration has applied for judicial review of this decision by the panel, dated October 12, 2012, under subsection 72(1) of the Act.

Facts

[3] The facts of this case are not in dispute.

[4] The respondent is a Canadian citizen. He was married for about twenty years; he has been divorced since 1992. He is seeking to sponsor his conjugal partner, a 27-year-old Algerian who lives in his native country.

[5] The applicant and his partner are of different religions and both practise their religions. The partner's mother tongue is Arabic, but he also communicates in French. They met through an Internet dating site when the respondent was 62, and the man who would become his partner was 20. The original contact occurred in 2006.

[6] The long distance contacts continued so well that the respondent travelled to Algeria in April 2007. During that visit, an application for a temporary visa to visit Canada was submitted. However, it was not successful.

[7] Since then, the respondent has gone to Algeria once a year for a few weeks at a time.

[8] During the years 2006 and 2007, the respondent was already in a relationship with another man, of Libyan origin, whom he had sponsored to Canada. The evidence shows that this relationship ended in December 2007. Nonetheless, the respondent continued to house this common-law partner until November 2009.

[9] It was on November 24, 2009, that an application for a permanent visa was submitted for the new partner. It was refused on May 17, 2010. The respondent appealed the refusal to the Immigration Appeal Division under section 63 of the Act, and a decision was issued on October 12, 2012.

[10] The applicant, the Minister of Citizenship and Immigration, had the burden of demonstrating that the decision under appeal was not reasonable. For the following reasons, the Minister did not demonstrate that the panel's decision was not reasonable in that the conclusion falls outside of the possible acceptable outcomes.

Issue

[11] The application for permanent residence in Canada was refused. The visa officer was of the opinion that the relationship between the respondent and his partner should be excluded because the conditions in section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) were met in that the relationship was not genuine or was entered into primarily for the purpose of acquiring a status or privilege under the Act:

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	**4.** (1) Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas:
(*a*) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or	*a*) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;
(*b*) is not genuine.	*b*) n'est pas authentique.

The purpose of the appeal before the panel was this sole question. In this case, was the relationship between the conjugal partners *mala fide*? The visa officer found that the relationship was *mala fide*, a finding that the panel overturned.

Impugned decision

[12] The issue for the Court to determine is the same as the one that was before the panel and the visa officer. The latter was of the view that the relationship was not genuine or that it was entered into primarily for the purpose of acquiring a status or privilege under the Act. On appeal, the panel disagreed.

[13] But while the respondent's burden on appeal before the panel was to convince the panel on a balance of probabilities, which he obviously did, the Minister's burden in this Court is heavier because the Court must show deference to the panel.

[14] In a detailed decision of some 115 paragraphs, the panel carefully examined the visa officer's reasons for his refusal. The panel conducted a two-step review. First, it discussed whether

the relationship was genuine. Then, the panel considered whether the relationship, which was genuine, was a conjugal relationship with the result that the two men were conjugal partners.

[15] The panel extensively examined the case presented to it. The evidence was analyzed, and the findings were articulated. In my opinion, it is not necessary to review everything because the applicant failed to discharge his burden. Only two issues were raised, and I will examine them in turn, referring if necessary to the pertinent facts.

[16] The two issues are:

1. Did the panel err in considering that the conjugal partnership could become *bona fide* after the initial reason of one of the partners was to acquire a status or privilege under the Act?

2. Did the relationship between the respondent and his partner have the features of a conjugal partner relationship?

Standard of review

[17] Surprisingly, the applicant did not address the appropriate standard of review, arguing essentially that the decision should be overturned because of the two alleged errors. Obviously, the respondent submits that the standard of review is reasonableness.

[18] It may be that the applicant believes that a so-called error of law, if it has been made, means that the judicial review will be successful. That is not the case.

[19] Not all questions of law are judicially reviewed on a correctness standard. Already, in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, [*Dunsmuir*], the Supreme Court stated that a question of law that is not of "central importance to the legal system as a whole and outside the . . . specialized area of expertise" of the administrative tribunal (as stated in *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77 and repeated by the Court in *Dunsmuir* at paragraphs 55 and 60) is reviewed on the basis of reasonableness. Reasonableness is described as follows at paragraph 47 of *Dunsmuir*:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[20] Thus, to the extent that a question of law falls into this category, there will be more than one correct interpretation. In *Information and Privacy Commissioner v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, the Court explained further and even established a presumption in this regard:

> [34] The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that

> definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

Simply arguing that there was an error is not sufficient. Even if the review Court would have come to a different conclusion on a question of law, that does not mean that the decision should be overturned. The panel is entitled to deference even on questions of law. If the decision is justified, transparent and intelligible, it will have the elements of reasonableness, and it will be upheld to the extent that it falls within a range of possible, acceptable outcomes. It is not because the Court would have come to another conclusion that it is authorized, in law, to intervene.

[21] In this case, the panel had to decide whether, for immigration purposes, the respondent and his partner were conjugal partners. To do so, the panel had to apply a provision of the *Immigration and Refugee Protection Regulations* that it was familiar with. Specifically, the panel had to determine the time when the relationship should be considered for immigration purposes. This is a question of law. In my view, the presumption, in the absence of an argument to the contrary, should apply. The reasonableness standard will therefore be applied to this case. With respect to applying the law to the facts of the case, i.e. whether the relationship is such that it constitutes a relationship between conjugal partners other than for the purpose of entering into Canada, these are questions of mixed fact and law that call for an assessment under the reasonableness standard.

Analysis

[22] At the end of its analysis, the panel found that the respondent and his partner were conjugal partners and that the relationship was genuine and was not entered into primarily for immigration purposes.

[23] The Minister makes two complaints about the panel's decision. If I understand the first complaint, the Minister wants the analysis under section 4 of the Regulations to start and stop when the relationship is beginning to emerge. Thus, *mala fides* would have been established because the claimant told the respondent of his love barely two weeks after they began corresponding by Internet. According to the Minister, that proves that the relationship was entered into for the purpose of acquiring a status or privilege under the Act. The memorandum speaks in terms of thus [TRANSLATION] "concealing the [respondent's] initial motivation" (paragraph 25, Applicant's Memorandum). The Minister submits that the initial intention cannot change over time. Thus, he argues, ultimately, that the initial intention is proof of everything and that it therefore becomes the intention that matters for the purposes of section 4 of the Regulations.

[24] The other complaint about the panel's decision was that a conjugal relationship had not been established. Indeed, the Minister scarcely elaborated on the subject. He submits that the relationship must be more than just serious because it must have the features of a marriage.

[25] In my opinion, the second complaint can be disposed of quickly. The applicant had the burden of showing that the panel's analysis and findings were not reasonable. This burden was not discharged. It is certainly possible to have different opinions on the weight to give to the evidence in

the record. It could even be possible to draw a different conclusion from the evidence. But that does not make a decision unreasonable.

[26] The panel conducted a careful analysis of the factors that the jurisprudence (*M. v H.*, [1999] 2 SCR 3) has advanced to determine whether a conjugal relationship exists: shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. As Madam Justice Tremblay-Lamer said in *Leroux v Minister of Citizenship and Immigration*, 2007 FC 403, the weight to attach to these factors may vary, but ultimately the relationship must have "a sufficient number of features of a marriage to show that it is more than just a means of entering Canada as a member of the family class" (paragraph 23). In addition, the panel examined other pertinent factors. The panel related the evidence to all these factors and concluded that the relationship, although unorthodox, was a conjugal partnership, in accordance with the jurisprudence, and that it was genuine. The panel's analysis is, in my opinion, persuasive. The Minister was unable to show how the conclusion was not reasonable in light of *Dunsmuir*, above.

[27] The other complaint is also not founded. The applicant made much of the amendment to section 4 of the Regulations and concluded that the conjugal partners' intention must be their intention at the beginning of the relationship. The applicant insists that the decision in *Donkor v Minister of Citizenship and Immigration*, 2006 FC 1089 [*Donkor*] applies *a contrario*, so to speak, because the change to the Regulations was intended to prevent a relationship that was originally for immigration purposes from improving and satisfying section 4.

[28] In my view, the *Donkor* decision must be used with great caution. That case does not deal with the existence, at some point, of a relationship between conjugal partners but with a common-law relationship to which the situation of a marriage of convenience was applied (*Horbas v Canada (M.E.I.)*, [1985] 2 FC 359 [*Horbas*]). The Court found that the drafting of section 4 at that time permits a marriage to become genuine *ex post facto*, that is, after it is celebrated, which means that a marriage that was for immigration purposes at the outset can meet the conditions of section 4 of the Regulations. Indeed, the Minister argues that the amendments would now prevent a marriage contracted for immigration purposes from becoming valid.

[29] With respect, that is not the issue. Based on *Donkor*, *Horbas* and the amendments to section 4, the applicant is seeking to extend the scope of section 4 to the very beginning of a relationship, before it can even become a conjugal relationship, a common-law relationship or a marriage. The applicant wants the declaration of love that some could consider hasty, to the extent that it would be understood as revealing dishonourable intentions, made shortly after the initial contact, to be sufficient to vitiate the relationship forever. This would be as if, by analogy with *Horbas*, a genuine marriage without any intention to acquire an immigration status or privilege was vitiated because one of the partners, well before the marriage, could have had an intention in regards to immigration. Rather, I believe that *Donkor* and *Horbas* may be used to argue that once a marriage has been entered into or a common-law relationship established for immigration purposes, it should not be possible to change its nature under section 4 of the Regulations. But again the common-law relationship must have been established or the marriage entered into on that basis.

[30] In our case, the panel concluded that the conjugal partnership only began much later than the declaration of love. This is a conclusion that the panel could draw from the evidence before it. If the conjugal partnership had been for immigration purposes or was not genuine at the time it was established, one could understand the Minister's argument that the nature of the relationship cannot change. But that is not the situation in our case.

[31] Moreover, it seems to me that the very wording of section 4 of the Regulations does not support the interpretation that the applicant wants to give it solely on the basis that the change to the wording was directed to the type of situation the Court is faced with. Essentially, the applicant submits that, in making section 4 disjunctive and because of the difference in verb tenses in paragraphs 4(1)(*a*) and 4(1)(*b*), the drafters of the Regulations ensured that the passage of time could not make a relationship genuine. This shows little regard for the wording of the Regulations.

[32] In both its French and English versions, the Regulations require that the relationship in question, whether it is a marriage, common-law partnership or conjugal partnership, be in place, in English "was entered into primarily". The panel was entitled to consider that the important time for determining the genuineness of the relationship was when the relationship came into being. That is when the intention must be examined to see whether the relationship was entered into primarily to acquire a status or privilege under the Act. In my view, that is a reasonable interpretation that the panel could give to regulations that it applies regularly and in which it has expertise.

[33] I would not find that the claimant's statements, barely two weeks after the initial contact, are not relevant to the decision as to whether the conjugal partnership was primarily for immigration purposes. Rather, contrary to what the applicant appears to be arguing, they is not conclusive.

[34] The panel properly considered this unexpected declaration of love. It was satisfied that the relationship had evolved to become a relationship that remained genuine and that, at the time the conjugal partnership came into being, was not entered into for immigration purposes (paragraphs 45 and 95 of the Reasons for Decision). Such a quick declaration could have aroused suspicions: one may think that an explanation would be expected. The panel was alert, and it examined the evidence to satisfy itself of the quality of the relationship when it came into being. There is no reason for the Court to intervene. The panel's decision had all the features of reasonableness.

[35] I concur with counsel for the parties that there is no question for certification arising.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the Minister of Citizenship and Immigration's application for judicial review of the decision by the Immigration Appeal Division of the Immigration and Refugee Board dated October 12, 2012, is dismissed.

"Yvan Roy"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	IMM-11015-12
STYLE OF CAUSE:	MINISTER OF CITIZENSHIP AND IMMIGRATION and Laurent VILLENEUVE
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	AUGUST 27, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	ROY J.
DATED:	NOVEMBER 25, 2013

APPEARANCES:

Patricia Nobl	FOR THE APPLICANT
Nicholas Daudelin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPLICANT
Heenan Blaikie Montréal, Quebec	FOR THE RESPONDENT