Federal Court  Cour fédérale

Date: 20150216

Docket: IMM-5987-14

Citation: 2015 FC 187

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 16, 2015

Present: The Honourable Mr. Justice Martineau

BETWEEN:

ISABELLE PATRY-SHALA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is challenging the legality of a decision of the Immigration Appeal Division of the Immigration and Refugee Board [Panel], dated July 16, 2014, dismissing the appeal she filed with regard to the refusal of an application for a permanent resident visa in the family class made by her husband, Valon Shala [visa applicant].

[2] The applicant, a Canadian citizen, met the visa applicant, an Albanian from Kosovo, in August 2009, during a trip to Italy. The applicant and the visa applicant met by chance in a bar and spent the rest of the applicant's vacation together. After the applicant returned to Canada, they kept in touch by Skype, MSN and telephone. The visa applicant applied for a visitor's visa, which was refused on October 23, 2009. In December 2009, the applicant returned to Italy and proposed marriage to the visa applicant. The visa applicant agreed, and both of them went to Kosovo, where they married on December 22, 2009. The applicant then returned to Canada.

[3] The visa applicant filed his first application for permanent residence as a member of the family class, which was refused on August 11, 2010. The applicant appealed the refusal but withdrew her appeal on November 12, 2010. The visa applicant then filed a second application for permanent residence, again in the family class. Following an interview with the visa applicant, the visa officer refused the application. This time, the applicant's second appeal was heard, but the Panel dismissed it on July 16, 2014, hence this application for judicial review, which challenges the reasonableness of the Panel's decision while questioning the impartiality of the member, Dana Kean, who heard the appeal [the member].

Reasonableness of the Panel's decision

[4] The reasons given by the Panel and clear and intelligible. Essentially, the Panel concluded that the marriage was not genuine and that the visa applicant entered into the marriage primarily for the purpose of acquiring a status in Canada and was therefore not considered a spouse under subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. The Panel noted several inconsistencies or contradictions concerning the visa

applicant's answers following the applicant's marriage proposal; whether a wedding reception had been held; the fact that the visa applicant did not know that the applicant had not told her family about her wedding plans; and the fact that the applicant had questioned the visa applicant's intentions in MSN conversations. The Panel also pointed out that the applicant and the visa applicant do not share a common language because the visa applicant has very little knowledge of English. Moreover, the Panel was not satisfied with the answers to several legitimate questions, namely, why the visa applicant's relatives did not attend the wedding; why Albanian traditions were not respected; why the wedding photographs were only taken in 2010; and, finally, why the visa applicant was now able to answer a number of questions that he had been unable to answer at the interview with the visa officer.

[5] The applicant now submits that the Panel's findings—which should be afforded deference on judicial review—are nevertheless reviewable in this case because they are based on conjecture and do not take into consideration the explanations given to the Panel. The respondent challenges this, of course, arguing on the contrary that the Panel's findings in this case are based on evidence in the record and are reasonable.

[6] First of all, the applicant notes in particular that the Panel's findings regarding the inconsistency between the applicant's questioning of the visa applicant's intentions in MSN conversations and the fact that the visa applicant denied having had these conversations were exaggerated and amounted to a memory test. Furthermore, the visa applicant's explanation that the changes in his relationship status on Facebook had been made by hackers was reasonable but was ignored by the Panel. Since civil marriage is a mere formality in Kosovo and the spouses did

not wear traditional dress because they are not religious, the Panel could not draw a negative inference from the fact that no wedding photos were taken.

[7] Second, the applicant alleges that the conclusion that the marriage is not genuine is unreasonable because the Panel ignored numerous positive factors: the economic support provided by the applicant; their continued and constant communication; the marital relationship during the applicant's trips; the spouses' knowledge of the details of each other's personal lives; the public nature of the relationship; their plans for the future; and the fact that they communicate with each other in English at a level that suits them. The applicant alleges that this evidence directly contradicts the Panel's findings and that the Panel must therefore explain why this evidence was not accepted (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 1998 CanLII 8667 (FC) at para 17 [*Cepeda-Gutierrez*]).

[8] The respondent replies that the Panel's finding that the visa applicant entered into the marriage primarily for the purposes of obtaining permanent residence is based on ample evidence: the short duration of the relationship before marriage; the visa applicant's difficulties speaking English; the contradictions, insufficient answers and lack of wedding photographs; the fact that the visa applicant was living in Italy illegally when he met the applicant; and his interest in obtaining a status in Canada. According to the respondent, the specific items of evidence raised by the applicant do not truly contradict the Panel's finding of fact, such that the decision in *Cepeda-Gutierrez*, above, does not apply. The Panel agreed that the applicant had acted in good faith, that she had visited the visa applicant many times and that they stayed in constant contact. The fundamental problem is that the applicant's evidence does not show that the visa applicant

acted in good faith, such that this application for judicial review must be dismissed: *Gill v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1522.

[9] I agree with the respondent that the applicant's arguments should not be accepted. The Panel did not cast doubt on the applicant's good faith and did not reject the applicant's evidence, including the submissions to the effect that the applicant and the visa applicant were in contact, that they lived as husband and wife when the applicant came to visit, that the applicant supported the visa applicant financially and that they had talked about future plans. However, the Panel concluded that the visa applicant was not credible and that his intention was to enter into the marriage for the purposes of obtaining a status in Canada. Although some of the inconsistencies or contradictions noted by the Panel may seem minor at first glance, we must consider their cumulative effect, which on the whole undermines the visa applicant's credibility. I am therefore of the opinion that the Panel's findings of fact regarding the genuineness of the marriage and the visa applicant's intentions are reasonable, even if another decision maker might have arrived at a different conclusion, which I do not have to rule on for myself today (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Kim v Canada (Citizenship and Immigration)*, 2008 FC 1291 at para 18).

No reasonable apprehension of bias

[10] The applicant is also of the view that the member's general behaviour at the hearing gives rise to a reasonable apprehension of bias. In her affidavit, the applicant states that at the hearing, the member [TRANSLATION] "adopted an intimidating and hostile attitude towards [her] and [the visa applicant]" and that the member was [TRANSLATION] "aggressive . . . ; she rolled her eyes,

waved her arms, intimidated me and gave me the impression that she was not neutral and impartial". The applicant alleges that the Panel was acting not as a fact finder, but as an actual judge and accuser by assisting counsel for the Minister in her work, which is contrary to the rules of natural justice. The applicant states that, since the signs of bias surfaced gradually, the fact that she did not raise a reasonable apprehension of bias at the hearing does not imply a waiver of the rules of natural justice. This is a case where the Court must be flexible in this regard (*Chaudhry v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1015), particularly because under section 23 of the *Code of Conduct for Members of the Immigration and Refugee Board of Canada* (December 15, 2012, online: IRB < http://www.irb-cisr.gc.ca >), "[m]embers are expected to approach each case with an open mind and, at all times, must be, and must be seen to be, impartial and objective".

[11] In response, the respondent notes that there is a strong presumption that administrative decision makers discharge their duties appropriately and with integrity. The applicant bears the heavy evidentiary burden of rebutting this presumption, and the Panel is allowed to show signs of frustration. According to the respondent, the fact that the Panel conducted a zealous examination does not allow this Court to find a reasonable apprehension of bias. Moreover, most of the questions that the Panel asked, including those raised in the applicant's memorandum, were open-ended questions, and all the questions were relevant. The Panel did not make any unwarranted or inappropriate comments. Likewise, counsel for the Minister states that, at the hearing, [TRANSLATION] "[she did] not notice anything unusual in the [Panel's] behaviour" and that she did [TRANSLATION] "not notice that [the Panel] sighed, rolled her eyes or waved her arms" (Affidavit of Ariane Cohen, Respondent's Memorandum and Affidavits, at paras 5-7).

Furthermore, at the hearing, the applicant's lawyer agreed to allow the Panel to ask all these questions. According to the respondent, the applicant waived her right to argue a reasonable apprehension of bias by not raising it at the first available opportunity: *Chamo v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1219 at para 9; *Acuna v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1222 at paras 34-38; *Hulej v Canada (Citizenship and Immigration)*, 2014 FC 283 at para 11. Moreover, counsel for the applicant misinterpreted *Chaudhry*, above, because the Court itself noted at para 16 that "Mr. Chaudhry's counsel appropriately objected to the Member's conduct".

[12] I agree with the respondent's general reasoning. I would add that even if the Court found that the applicant did not waive her right to argue a reasonable apprehension of bias, the applicant did not show that the member's behaviour gave rise to a reasonable apprehension of bias. For example, to show bias on the part of the member, the applicant cites in her written memorandum several questions that were asked, but it is apparent that these questions, when placed in their proper context, do not show bias. Here are some of the excerpts from the hearing transcript that the applicant submits (the Panel's questions are marked "Q.", and the applicant's answers are marked "A."):

> [TRANSLATION]
>
> Q. Mr. Shala was still in Italy?
>
> A. Yes.
>
> Q. And you were in Canada.
>
> A. Exactly, yes.
>
> Q. What was he doing in Italy?
>
> A. He was—he was working.

Q. What kind of work?

A. Construction.

Q. Do you have any more details?

A. Well, he did house repairs.

Q. For what company? On what terms? Did he have papers?

A. Well, he didn't have any papers. He didn't have a work visa but he worked with his friends to help out [the company]. I don't know. I don't remember.

(Certified Tribunal Record [CTR], Hearing Transcript, at pages 9-10).

Q. Your counsel could maybe show you. The first sentence on page 26, it's your husband's form, okay? The first thing he says is, [TRANSLATION] "The reception didn't happen".

. . .

A. Okay. [TRANSLATION] "The reception didn't happen". Well, actually, it—it did happen. Well . . . We did—basically, we, the ceremony, it's—pardon me?

Q. I'm not asking for your version because I fully understood your version. My question concerns why Mr. Shala's version seems to be different.

A. Because maybe for him a supper in (inaudible) normal is not a reception. But me, I think that it's—you know, there's a supper; it's celebrated with the whole family. It's like a reception. For me, a supper, it's—it's a reception. Maybe for him in his—you know? It's different from me. But for me, that's a reception.

Q. Okay. Who filled out this form, madam?

A. Well, it's both of us. It's me.

Q. Whose handwriting is this?

A. It's me. It's me. It's my handwriting.

Q. Okay. Why did you write this when your understanding of the facts is different? Because it was you who filled it out. That's what I don't understand.

> A. It's not—I—me, for me, having supper, then—for me, it's like a ceremony. Maybe I—
>
> Q. But madam, you were the one who wrote that. That's why it is not logical.
>
> A. Yes, I know. I know it.
>
> (CTR, Hearing Transcript at pages 37-39)
>
> Q. So, what lead to this exchange, madam?
>
> A. What do you want me to say?
>
> Q. The truth would be helpful, madam.
>
> (CTR, Hearing Transcript at page 81)

[13] The other examples to which the learned counsel for the applicant referred in court during his oral arguments are inconclusive. I do not think that the transcript shows that the member was trying to trap the applicant and the visa applicant, or that her examination was aggressive or intimidating. As the respondent noted, the member asked relevant and, for the most part, open-ended questions without any objection from counsel for the applicant. The fact that the member tried to elicit more specific details, noted contradictions or a lack of logic, or corrected factual errors does not prove that the member was looking for ways to lure the applicant and the visa applicant into contradicting themselves or each other. There is no video recording of the hearing. That said, the affidavit of Ariane Cohen contradicts the applicant's affidavit with regard to the member's behaviour. I am of the opinion that the facts in this case can be sharply distinguished from the reprehensible conduct of the member in question in *Guermache v Canada (Minister of Citizenship and Immigration)*, 2004 FC 870.

[14] What "an informed person, viewing the matter realistically and practically—and having thought the matter through—" would conclude is that the member's behaviour did not give rise to a reasonable apprehension of bias, having regard to the circumstances of the case (*Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369, Justice de Grandpré, dissenting, at p 394; *R v S (RD)*, [1997] 3 SCR 484 at para 111).

[15] For these reasons, the application for judicial review should be dismissed. The parties did not raise any serious question for certification, and the Court will not certify any such question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed, and no question is certified.

"Luc Martineau"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-5987-14
STYLE OF CAUSE:	ISABELLE PATRY-SHALA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 9, 2015
JUDGMENT AND REASONS:	MARTINEAU J.
DATED:	FEBRUARY 16

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