Date: 20070417

Docket: IMM-2819-06

Citation: 2007 FC 403

Ottawa, Ontario, the 17th day of April 2007

Present: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

JEAN-STÉPHANE LEROUX

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision dismissing the applicant's appeal to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board.

Facts

[2] The applicant in this proceeding alleges that the applicant for permanent residence, a 26-year-old Moroccan citizen, is his conjugal partner. It is in this capacity that he sponsored the latter's application for permanent residence, which was filed in Rabat, Morocco, on July 16, 2004.

[3] The applicant works as a travel agent and met the applicant for permanent residence in Agadir during a business trip in January 2003. They saw each other again on February 1, 2003, and spent one night together.

[4] In May 2003, the applicant returned to Agadir, where he spent two weeks with the applicant for permanent residence in a hotel. He returned in November 2003 and spent two weeks with the applicant for permanent residence, again at a hotel. From February 2003, they stayed in contact by mail, Internet and telephone.

[5] Considering that the applicant for permanent residence's chances of obtaining a visitor visa were too slim, the applicant decided to sponsor an application for permanent residence for the latter. Accordingly, the applicant for permanent residence filed such an application in Rabat, Morocco, on July 16, 2004.

[6] On January 14, 2005, an immigration officer in Rabat concluded that the applicant for permanent residence was excluded from the family class under section 4 of the *Immigration and Refugee Protection Regulations* (Regulations). According to the immigration officer, the applicant

for permanent residence's relationship with the applicant [TRANSLATION] "was not genuine and was entered into primarily for the purpose of acquiring a status or privilege under the Act".

[7] The applicant appealed to the IAD, and a hearing *de novo* was held in February 2006.

The IAD decision

[8] In dismissing the appeal, the IAD concluded in its decision dated May 9, 2006, that "the appellant has failed to establish, on the preponderance of the evidence, that his relationship with the applicant is a conjugal relationship within the meaning of section 2 of the Regulations" and reaffirmed the immigration officer's opinion that the relationship was not genuine.

[9] The IAD noted that the applicant for permanent residence was unable to mention the common interests he shared with the applicant. It also noted "it was when they learned that it would be impossible for the applicant [for permanent residence] to obtain a visitor's visa that they thought of sponsorship as a conjugal partner".

[10] The IAD noted that during the one-year period preceding the filing of the application for permanent residence, which it considered to be "crucial to the definition of a conjugal relationship", that is, from July 2003 to July 2004, the two persons spent only two weeks together, in a hotel in Morocco. In addition, the IAD noted that during this period:

> … the relationship between the appellant and the applicant was at its lowest, to the point where the correspondence between the two of

> them dwindled and reflected some serious tensions between them. Furthermore, in general, the vast majority of e-mails came from the appellant and reflected his feelings for the applicant, while the content of the applicant's e-mails related mainly to permanent residence in Canada.

Legislation

[11] Subsection 12(1) of the Act explains the basis for determining whether a foreign national may be selected as a member of the family class:

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.	**12.** (1) La sélection des étrangers de la catégorie "regroupement familial" se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.

[12] Subsection 13(1) of the Act states the following:

13. (1) A Canadian citizen or permanent resident may, subject to the regulations, sponsor a foreign national who is a member of the family class.	**13.** (1) Tout citoyen canadien et tout résident permanent peuvent, sous réserve des règlements, parrainer l'étranger de la catégorie « regroupement familial ».

[13] Under section 4 of the Regulations, in order to qualify for the family class, the relationship between a foreign national and his or her sponsor must be genuine and not solely for the purpose of acquiring a status or privilege under the Act:

4. For the purposes of these Regulations, a foreign national	**4.** Pour l'application du présent règlement, l'étranger n'est pas

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.	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.

[14] The expression “conjugal partner” is defined as follows in section 2 of the Regulations:

2.… [I]n relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year.	**2.** À l’égard du répondant, l’étranger résidant à l’extérieur du Canada qui entretient une relation conjugale avec lui depuis au moins un an.

[15] Paragraph 121(*a*) of the Regulations specifies that the expression “a period of at least one year” in section 2 means from the date of the filing of the application for permanent residence in Canada:

The requirements with respect to a person who is a member of the family class or a family member of a member of the family class who makes an application under Division 6 of Part 5 are the following:	Les exigences applicables à l’égard de la personne appartenant à la catégorie du regroupement familial ou des membres de sa famille qui présentent une demande au titre de la section 6 de la partie 5 sont les suivantes :
(a) the person is a family member of the applicant or of the sponsor both at the time the application is made and, without taking into account whether the	a) l’intéressé doit être un membre de la famille du demandeur ou du répondant au moment où la demande est faite et,

person has attained 22 years of age, at the time of the determination of the application	qu'il ait atteint l'âge de vingt-deux ans ou non, au moment où il est statué sur la demande

Applicable standards of review

[16] The standard of review applicable to an IAD decision concerning a sponsorship application and based on findings of fact is patent unreasonableness. (*Canada (Minister of Citizenship and Immigration) v. Navarrete*, 2006 FC 691, [2006] F.C.J. No. 878 (QL) at paragraph 17; *Sanichara v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1015, [2005] F.C.J. No. 1272 (QL) at paragraph 11; *Jaglal v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 685, [2003] F.C.J. No. 885 at paragraph 13.

[17] However, the appropriate standard of review for questions of interpretation of law is necessarily the standard of correctness (*Canada (Minister of Citizenship and Immigration) v. Savard*, 2006 FC 109, [2006] F.C.J. No. 126 (QL)).

Analysis

[18] First of all, I note that an appeal before the IAD is a hearing *de novo*. Accordingly, the applicant and the applicant for permanent residence must submit reliable and sufficient evidence showing that their conjugal relationship is genuine and was not entered into primarily for the purpose of acquiring any status or privilege under the Act (*Froment v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1002, [2006] F.C.J. No. 1273 (QL) at paragraph 19, citing *Sanichara*, *supra*, at paragraph 8; *Mohamed v. Canada (Minister of Citizenship and Immigration)*,

2006 FC 696, [2006] F.C.J. No. 881 (QL), at paragraph 40; *Morris v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 369, [2005] F.C.J. No. 469 (QL), at paragraph 5).

[19] Contrary to the applicant's submissions, I am of the opinion that the consideration of the applicant for permanent residence's status as a conjugal partner under section 2 of the Regulations is an integral part of the interpretation of section 4. If it is not established on a balance of probabilities that such a relationship exists, it is not a genuine conjugal relationship, such that it may be inferred that it was entered into primarily for the purpose of acquiring a status or a privilege under the Act.

[20] In this case, the *ultra petita* rule has not been violated, because the matter of the existence and the nature of the relationship between the applicant and the applicant for permanent residence is inextricably woven into the determination of the application of section 4 of the Regulations and is not a new issue before the tribunal. In addition, the Minister clearly alleged the absence of a conjugal relationship and asked the IAD to render a decision on this point. It did not rule beyond what was asked.

[21] In its analysis, the IAD relied on *M. v. H.*, [1999] 2 S.C.R. 3, which specifies seven non-exhaustive factors used to identify a conjugal relationship, namely, shared shelter, sexual and personal behaviour, services, social activities, economic support, children, and the societal perception of the couple. In this judgment, the Supreme Court acknowledged that the weight to be attached to the various factors may vary infinitely and hold true for same-sex couples. Accordingly,

courts must use a flexible approach to determine whether a conjugal relationship exists, since relationships of couples vary (*M. v. H.*, *supra*, at paragraph 60).

[22] The applicant submits that these criteria are not appropriate in the case of a sexual relationship between two partners, one of whom resides in a Muslim country where homosexuality is prohibited. Several criteria are impossible to meet, for example, shelter, because they are obviously separated by immigration restrictions; the presence of children, because it is not possible to have children naturally (except through adoption); and the societal perception of the couple, as homosexuality is prohibited and frowned upon.

[23] Although this Court has not rendered any decision about the criteria to be used in an immigration context to determine whether there is a conjugal relationship, several IAD decisions have recognized that the criteria in *M. v. H.* were established for couples living in Canada and must be modified for couples living in different countries (see: *McCullough v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 25, *Schatens v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 330, *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 3; *Porteous v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 560). I agree. It seems to me to be important to keep in mind the restrictions which apply because the partners live in different countries, some of which have different moral standards and customs which may have an impact on the degree of tolerance for conjugal relationships, especially where same-sex partnerss are concerned. Nevertheless, the alleged

conjugal 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.

[24] In other words, as stated by the IAD in *Porteous, supra*, at paragraph 26, a conjugal relationship is more than a precursor, or plan, to share a conjugal relationship in future.

[25] First of all, the applicant submits that the IAD erred in law by mistakenly interpreting section 2 of the Regulations so as to restrict its analysis to the one-year period preceding the filing of the application for permanent residence. The applicant submits that this interpretation of section 2 and paragraph 121(*a*) of the Regulations is a reviewable error.

[26] Section 2 of the Regulations clearly states that the relationship must have existed "for a period of at least one year" as acknowledged by Harrington J. at paragraph 17 in *Savard*, *supra*: "[section 2] requires that the individuals have been in a conjugal relationship for a period of at least one year at the time of filing of the sponsorship application". Neither the Regulations nor the Act restricts the examination exclusively to the twelve-month period preceding the filing of the application. Therefore, the IAD erred in law in its interpretation of section 2 of the Regulations by restricting its analysis this way. I realize that in this case, considering the very short period of cohabitation, this error has little impact, but because the standard of correctness applies, the Court must rectify this error in law.

[27] With regard to the application of criteria specific to the concept of conjugal partner, the applicant submits that the IAD did not consider the special situation of a homosexual relationship and the difficulties this relationship would entail for a partner residing in a Muslim country where homosexuality is prohibited.

[28] On this point, I am of the opinion that it is impossible on reading the reasons to conclude that the IAD applied the criteria in a flexible manner on the basis of all the relevant facts in order to determine whether or not the relationship is genuine. The IAD had to analyze the couple's situation from the perspective of cohabitation. On this point, the IAD mentioned that the appellant did not consider living in Morocco and preferred living in Montréal. "It was when they learned that it would be impossible for the applicant [for permanent residence] to obtain a visitor's visa that they thought of sponsorship as a conjugal partner". As the applicant notes, I am of the opinion that this fact shows an intention to cohabit. It was not reasonable for the tribunal to infer that this evidence showed that the relationship was not genuine.

[29] Moreover, the IAD failed to analyze abundant relevant evidence proving the genuineness of the relationship, including telephone conversations (which were significant because the applicant for permanent residence had difficulty writing in French), MSN correspondence, gifts, discussions, evenings, trips, the festivities they attended together and the use of free Internet telephony.

[30] All this evidence was important, as it could assist the tribunal in assessing the nature of the relationship and its genuineness in a non-traditional situation in which one partner is a foreign

national, where immigration rules prohibit extended visits and where custom and traditions condemn the sexual orientation and, by the same token, the relationship itself.

[31] I realize that a decision-maker is not required to mention in his or her reasons all the evidence considered. However, as Evans J. stated in *Cepeda-Gutierrez (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (QL), at paragraph 17:

> … the 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": Bains v. Canada (Minister of Employment and Immigration) (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[32] In this case, I am of the opinion that the reasons for decision should have mentioned why this evidence was not considered. I also note that the IAD drew a negative conclusion about the genuineness of the relationship on the basis of a fact that had nothing to do with the conduct of the two partners, that is, the personal interest of the applicant for permanent residence’s elder brother. Because the behaviour of the brother of the applicant for permanent residence had no impact on the couple’s relationship, it was patently unreasonable for the IAD to take this irrelevant evidence into consideration.

[33] These errors are material to the outcome of this case and warrant intervention by this Court.

[34] For these reasons, the application for judicial review is allowed. The decision of the IAD is set aside, and the matter is referred to a differently constituted panel for rehearing and redetermination.

[35] With regard to the applicant's argument concerning the decision-maker's bias, it will not be necessary to deal with it, since another decision-maker will hear this matter.

[36] Counsel for the applicant suggested the following questions for certification:

[TRANSLATION]

1. Is it appropriate to interpret the definition of conjugal partners in accordance with the judgment in *M. v. H.* in the context of the relationship of two same-sex partners residing in two different countries, that is, a long-distance relationship?

2. Is it appropriate to interpret the definition of conjugal partners in accordance with the judgment in *M. v. H.* in the context of the relationship of two same-sex partners residing in two different countries, one of whom lives in a country that prohibits homosexuality?

3. What are the criteria for the application of the definition of conjugal partners within the meaning of section 2 of the IRPR?

4. What are the criteria for the application of the definition of conjugal partners within the meaning of section 2 of the IRPR when one of the partners lives in a country that prohibits homosexuality?

[37] Considering that in *M. v. H.* the Supreme Court has already ruled on the generally accepted characteristics for determining if a relationship is a conjugal one, and considering that such criteria

must be applied flexibly, it seems to me that each case must be decided on its own facts. Accordingly, the decision-maker will have to consider these characteristics in light of the individual situation. Therefore, the questions proposed do not raise any questions of general importance. Accordingly, no question will be certified.

JUDGMENT

The application for judicial review is allowed. The decision of the IAD is set aside, and the matter is referred to a differently constituted panel for rehearing and redetermination.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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