

**Date: 20070907**

**Docket: IMM-865-07**

**Citation: 2007 FC 891**

**Ottawa, Ontario, September 7, 2007**

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

**BETWEEN:**

**CHANTA OUK**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Chanta Ouk, a Canadian citizen, seeks judicial review of a decision of an Immigration Appeal Division Panel Member, dated February 5, 2007, dismissing an appeal from a Visa Officer's denial of sponsorship of Thorn Sambo, the applicant's husband, for permanent residence to Canada.

[2] Ms. Ouk met Mr. Thorn on an extended trip to Cambodia in 2001. They remained in contact by telephone when she returned to Canada. In early 2004, the couple became engaged when Ms. Ouk's parents travelled to Cambodia to meet Mr. Thorn and his family. Several months later, Ms.

Ouk and Mr. Thorn married in a ceremony in Cambodia. She then applied to sponsor him to Canada as a member of the family class pursuant to s. 13(1) of the *Immigration and Refugee Protection Act* S.C. 2001, c.27.

[3] In his Sponsored Spouse Questionnaire, Mr. Thorn listed five siblings, with none in Canada. When the Visa Officer contacted one of his brothers and that brother's wife separately, they each listed seven siblings. Mr. Thorn responded to this inconsistency by claiming that they were confused. The Visa Officer denied the visa application, in part on his finding that the inconsistency disclosed a contrived plan to bring the family to Canada.

[4] Ms. Ouk appealed the Visa Officer's decision to the Immigration Appeal Division pursuant to s. 63(1) of the *Act*. At the hearing, the communication link with Mr. Thorn in Cambodia was insufficient to allow him to give testimony by teleconference. Ms. Ouk testified, and provided evidence to show, that the discrepancy between the stated number of Mr. Thorn's siblings was partially explained by a long-term grudge held by Mr. Thorn against his half-sister, Thorn Sary, the product of an affair between his father and another woman, whom he did not consider to be his sister. Thorn Sary had been included by Mr. Thorn's brother and sister-in-law, while his attitude towards her had caused him to leave her off the list of his siblings.

[5] Ms. Ouk testified that Thorn Sary lived with her family, due to a connection between Ms. Ouk's mother and Ms. Thorn's husband, dating to their meeting in a refugee camp in Vietnam. This circumstance was the source of much questioning by the IAD Panel Member.

[6] The final name provided by Mr. Thorn's brother and his wife was alleged to be that of Ms. Ouk's mother. This anomaly was not fully explored by the Panel Member, but was not included in her reasons for denying the appeal and was thus not at issue in this judicial review. In any event, it was explained by Ms. Ouk as resulting from confusion over the translation of Cambodian terms for family members.

**DECISION OF THE PANEL MEMBER:**

[7] The Panel Member did not find the explanations of Ms. Ouk and the evidence credible. She further held that the failure to disclose the existence of Ms. Thorn Sary was a deliberate attempt to withhold evidence from the Visa Officer which might be detrimental to Mr. Thorn Sambo's application for permanent residence. The Panel concluded that the marriage was not *bona fide* and was entered into primarily for the purpose of gaining status under the IPRA. Accordingly, the appeal was dismissed.

**ISSUES:**

[8] Did the Panel err in finding that the applicant's marriage was not *bona fide*?

**ANALYSIS:**

[9] The standard of review in deciding whether a marriage is genuine is patent unreasonableness: *Donkor v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1089 [*Donkor*].

[10] However, as explained by my colleague Justice Hughes, the selection of inappropriate criteria to discern the genuineness of a marriage is an error of law, reviewable on a correctness standard: *Khan v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1490 [*Khan*].

[11] An application for sponsorship in the family class by a Canadian citizen or permanent resident may be denied based on s. 4 of the *Immigration and Refugee Protection Regulations, 2002*, SOR/2002-227, which reads as follows:

4. For the purposes of these Regulations, a foreign national 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.

\* \* \* \* \*

4. Pour l'application du présent règlement, l'étranger n'est pas 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.

[12] The evaluation of a marriage for the purpose of Regulation 4 was recently revisited in *Donkor, supra*, in which the test from *Horbas v. Canada (Minister of Citizenship and Immigration)*

[1985] 2 F.C. 359 was restated in these terms:

1. The genuineness of relationship must be considered in the present tense such that a relationship that may not have been "genuine" at the outset may have become genuine; and
2. Consideration must be given as to whether the relationship was entered into primarily for the purpose of acquiring any status or privilege under the Act.

This is a cumulative test, such that both prongs must be found to be true before a marriage will be found not to be genuine for the purposes of Regulation 4.

[13] The criteria for the first part of the *Donkor* test, being that which focuses on the ‘genuineness’ of the marriage, have not been expressly set out: *Khan* at para. 20. In *Khera v. Canada (Minister of Citizenship and Immigration)* 2007 FC 632, the IAD was held to have reasonably considered such factors as: the length of the parties' prior relationship before their marriage; their age difference; their former marital or civil status; their respective financial situation and employment; their family background; their knowledge of one another's histories; their language; their respective interests; family connections in Canada; and, prior attempts by the sponsoree to come to Canada (at paragraph 10).

[14] The focus of the examination under s.4 of the *Regulations* is on the relation between the couple. While family connections may be seen as a consideration to be weighed, the genuineness of the marriage should be a separate question from concerns about familial connections.

[15] In this instance, the Panel appeared to be convinced of the occurrence of the wedding and honeymoon, and did not go beyond cursory inquiries into the relationship between the sponsor and sponsoree. The first prong of the *Donkor* test was not given the required focus, if the Panel were actually concerned about the genuineness of the marriage. Relevant factors, such as those enumerated in *Khera, supra*, were not addressed either during the hearing or in the Panel’s decision.

[16] Had the Panel properly found that the marriage between Ms. Ouk and Mr. Thorn was not genuine, it would have had to find also that the second step of the *Donkor* test was not met in order to refuse the sponsorship on the grounds of s. 4 of the *Regulations*. In order for the Panel to find that Ms. Ouk and Mr. Thorn’s marriage was primarily entered into for the purpose of gaining status or

privilege under the *Act*, it must be able to show that that finding is based on the evidence. I can find no analysis or reasoning in the transcript or reasons for the decision, which supports a finding that the primary purpose of this marriage was to gain status or privilege under the *Act*.

[17] The panel was clearly concerned about the dynamics of the Thorn family and the odd circumstance of the sponsoree's half sister living with the sponsor's family while being omitted from the sponsoree's list of siblings. While this is a valid concern, it should have been kept clearly separate from the question of the validity of the marriage between the sponsor and sponsoree. It was open to the appeal panel to find that the sponsoree is inadmissible for misrepresentation pursuant to s. 40 of the *Act* or that the marriage is not genuine, but the distinction between these two avenues of inquiry must be kept clearly separate.

[18] Accordingly, I find that the Immigration Appeal Division erred in law by incorrectly applying the appropriate test to determine the genuineness of the marriage at issue, and by failing to analyze the relevant criteria to address that test. The matter should therefore be returned to a differently constituted panel for a fresh appeal determination.

**JUDGMENT**

**IT IS THE JUDGMENT OF THIS COURT that:** the application is granted and the matter remitted to a differently constituted Immigration Appeal Division Panel for redetermination.

“Richard G. Mosley”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-865-07

**STYLE OF CAUSE:** CHANTA OUK

AND

THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** August 28, 2007

**REASONS FOR JUDGMENT:** MOSLEY J.

**DATED:** September 7, 2007

**APPEARANCES:**

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