Date: 20080201

Docket: IMM-5344-06

Citation: 2008 FC 133

Ottawa, Ontario, February 1, 2008

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

PHI ANNE THACH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Phi Anne Thach (the "Applicant") seeks judicial review of the decision of the Immigration and Refugee Board, Immigration Appeal Division (the "IAD"), dated September 15, 2006. In its decision, the IAD dismissed the appeal from the decision of a visa officer who had refused the application for a permanent resident visa for the Applicant's spouse, Ms. Chong Zenh Ung. The visa officer had refused to issue the visa because she was not satisfied that Ms. Chong Zenh Ung was a member of the family class under section 12 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") and sections 116 and 117(1)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations").

[2] The Applicant is a 47-year old Canadian citizen who was born in Vietnam. He lives in Windsor with a paternal uncle of his wife. The uncle introduced the Applicant to his niece by showing a photograph of her in March 2002. Subsequently, the Applicant spoke with the niece by telephone before travelling to Vietnam in July 2002 and marrying her on July 12, 2002.

[3] The Applicant applied for a permanent resident visa for his wife on June 11, 2003. On March 18, 2004, the wife was interviewed by a visa officer at the Canadian High Commission in Singapore. By letter dated April 7, 2004, a visa officer from the Canadian High Commission in Singapore found that Ms. Zenh was not a member of the family class under the Regulations and refused the sponsorship application.

[4] The Applicant appealed the decision of the visa officer before the IAD. Evidence was heard from the Applicant and his wife. Ultimately, the IAD issued a lengthy discussion dismissing the appeal. The key finding made by the IAD was that the marriage between the Applicant and his spouse was not genuine under section 4 of the Regulations because it had been entered into primarily for the purpose of obtaining status under the Act. The IAD commented upon the length of time the Applicant and his wife had known each other, the discrepancies in their ages, inconsistent evidence about the circumstances surrounding the choice of the wedding date, and the relatively short passage of time between the first meeting of the spouses and their wedding.

[5] The Applicant argues that the IAD made unreasonable and erroneous plausibility findings. He submits, as well, that the IAD erred by not taking cultural factors about overseas marriages into account when assessing the genuineness of a marriage.

[6] Further, the Applicant argues that the IAD committed a breach of procedural fairness by relying on the Computer Assisted Immigration Processing System Notes (the "CAIPS notes") as a transcript of what was said at the interview of the Applicant's wife, in the absence of an affidavit from the Visa Officer.

[7] Finally, the Applicant submits that the IAD erred by not accepting the fact that the evidence required a shift in the burden of proof such that the Minister of Citizenship and Immigration (the "Respondent") was required to call evidence. In the absence of such evidence, the IAD erred by not drawing a negative inference against the Respondent.

[8] The Respondent addressed two issues. First, he argues that the Applicant has failed to show that the decision of the IAD was patently unreasonable. Next, he submits that the Applicant has failed to show that the IAD committed a breach of natural justice.

[9] The first matter to be addressed is the applicable standard of review, having regard to a pragmatic and functional analysis. Four factors are to be considered: the presence or absence of a privative clause; the expertise of the tribunal; the purpose of the legislation and the nature of the question.

[10] There is no privative clause in the Act. No full right of appeal is provided but judicial review is available, if leave is granted. Accordingly, the first factor is neutral.

[11] The IAD is a specialized tribunal and is mandated by the Act to determine questions of fact and of law. The specialized nature of the IAD favours deference to its decision.

[12] The broad purpose of the Act is to regulate the admission of immigrants into Canada and to maintain the security of Canadian society. This involves consideration of many interests that may be in conflict with each other. Decisions made in a polycentric context tend to attract judicial deference.

[13] The final factor is the nature of the question. Here, the IAD conducted a *de novo* hearing relative to the issuance of a permanent resident visa to the Applicant's spouse. The genuineness of the Applicant's marriage was in issue, having regard to the Act and the Regulations. Section 12 of the Act and Section 4 of the Regulations are relevant here and insofar as the IAD is to assess the genuineness of a marriage against statutory requirements, it is dealing with a question of mixed fact and law. However, the issue in this case is factually intensive.

[14] Upon balancing the four factors involved in a pragmatic and functional analysis, I conclude that the applicable standard of review in this case is that of patent unreasonableness.

[15] Errors of law and breaches of procedural fairness are not subject to a pragmatic and functional analysis and are reviewable upon the standard of correctness.

[16] The Applicant's arguments address plausibility findings, an error of law and an alleged breach of procedural fairness with respect to the use made of the CAIPS notes by the IAD.

[17] The IAD's plausibility findings are in the nature of factual findings. They are reviewable on the standard of patent unreasonableness. This standard requires consideration of the evidence submitted, including the evidence about the introduction of the Applicant and his wife, their initial meeting, the timing of their marriage, the history of their communications by telephone and by mail, and visits by the Applicant to Vietnam after the marriage.

[18] The IAD concluded that the Applicant had failed to show that the marriage had not been entered into primarily for the purpose of acquiring any status or privilege under the Act. I am satisfied that this conclusion is not patently unreasonable and demonstrates an understanding and application of the test for assessing the genuineness of a marriage. I refer to the decision in *Horbas v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 359 where the Court said the following at page 365:

> It should first be observed that the test is a double test; that is, the spouse is disqualified under subsection 4(3) only if the marriage is entered into primarily for the purpose of gaining admission to Canada and not with the intention of residing permanently with the other spouse.

[19] The two-part test was restated in the recent decision in *Donkor v. Canada (Minister of Citizenship and Immigration*, [2006] F.C.J. No. 1375 (F.C.) as follows:

> 1. The genuineness of the relationship must be considered in the present tense such that a relationship that may not have been "genuine" at the beginning 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.

[20] According to the decision in *Khera v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 886, the first prong of the test includes analysis of the following factors: the length of the parties' prior relationship before the marriage, their ages and any difference in age, their former marital or civil status, their respective financial situations and employment histories, their family backgrounds, their knowledge of each other's personal histories, their language, their respective interests, family connections in Canada, and prior efforts by the sponsored spouse to enter Canada.

[21] On the basis of the evidence submitted during the hearing of the Applicant's appeal, the IAD could reasonably conclude that the acquisition of status under the Act was a primary factor for the marriage of the Applicant and his spouse. There was no independent evidence about cultural norms for the entry of arranged marriages in Vietnam. The presentation of such evidence may have affected the IAD's decision but it cannot be faulted for its absence.

[22] I turn now to the Applicant's argument that the IAD erred in law by not finding that the burden shifted to the Respondent once an applicant has adduced evidence in support of the genuineness of the marriage.

[23] I reject this argument. The Act clearly imposes a burden upon a person seeking a visa to submit sufficient evidence to show that the issuance of a visa is not contrary to the Act or Regulations. I refer to subsection 11(1) of the Act which provides as follows:

11.(1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11.(1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement, lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se conforme à la présente loi.

[24] Here, the Applicant was faced with the onus of showing that his wife was a member of the family class as defined in section 117 of the IRPA Regulations. He was required to show that the marriage was genuine for the purposes of the Act and the Regulations. The onus did not shift to the Respondent. Accordingly, it follows that the IAD did not err in law in this respect.

[25] Finally, the issue of alleged breach of procedural fairness remains to be addressed. Did the IAD commit a reviewable error by relying on the CAIPS notes in the absence of an affidavit from the Visa Officer?

[26] I am satisfied that there is no breach of procedural fairness as alleged. The CAIPS notes were but part of the evidence before the IAD. It is clear that the IAD considered the oral evidence of the Applicant and his wife, as well as the other evidence that was submitted, in reaching its decision. There is no basis for judicial intervention in this case and the application for judicial review is dismissed.

ORDER

The application for judicial review is dismissed. There is no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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