

**Date: 20081210**

**Docket: IMM-1097-08**

**Citation: 2008 FC 1365**

**Montréal, Quebec, December 10, 2008**

**PRESENT: The Honourable Maurice E. Lagacé**

**BETWEEN:**

**IRYNA BAHDANAVA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] This is an application for judicial review made pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), of a decision of an Immigration Officer, (the Officer) dated February 12, 2008, that refused the applicant's application after finding that the applicant and her sponsor's first marriage was dissolved for the primary purpose of obtaining permanent resident status in Canada.

## II. Facts

[2] The applicant and her sponsor were first married in their country of origin, Belarus, in 1979. They have two adult sons, Danil, born in 1979, and Pavel, born in 1984. Their marriage dissolved in January 2000, after Mr. Bahdanau began a relationship with Ms. Liudmila Kashkan.

[3] Mr. Bahdanau and Ms. Kashkan married in October 2000 and immigrated to Canada on June 28, 2004 with Danil and Pavel as dependents. The relationship between Mr. Bahdanau and Ms. Kashkan ended in August 2004, apparently because she did not wish to live with Danil and Pavel. Ms. Kashkan did not live with Mr. Bahdanau in Canada and was in a relationship with another man. She returned to Belarus and gave birth to a child from that other relationship in October 2004.

[4] Ms. Bahdanava came to Canada on a visitor's visa in May 2005 to visit her sons who allegedly arranged for their parents to meet up again and the two rekindled their relationship. Mr. Bahdanau and the applicant were remarried in June 2006 and he subsequently applied to sponsor her as a permanent resident.

## III. The impugned decision

[5] The Officer found the explanation given for Ms. Kashkan's refusal to live with Mr. Bahdanau in Canada to be unreasonable and was therefore of the opinion that their marriage was one of convenience for the purpose of obtaining permanent resident status. The Officer found that the explanation of the resumption of the marriage between the applicant and her husband

sounded staged and that Ms. Bahdanava came to Canada with the intention of renewing the relationship and staying in Canada. He therefore found that their first marriage had been dissolved for immigration purposes and the second marriage was therefore an excluded relationship pursuant to section 4.1 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

#### IV. Issues

[6] The central issues in this case are as follows:

1. Was it unreasonable for the Officer to find that the marriage between Mr. Bahdanau and Ms. Kashkan was a marriage of convenience?
2. Did the Officer breach the duty of procedural fairness?

#### V. The legislation

[7] Section 4.1 of the Regulations reads as follows:

**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 foreign national has begun a new conjugal relationship with that person after a previous marriage, common-law partnership or conjugal partnership with that person was dissolved primarily so that the foreign national, another foreign national or the sponsor

**4.1** Pour l'application du présent règlement, l'étranger n'est pas considéré comme l'époux, le conjoint de fait ou le partenaire conjugal d'une personne s'il s'est engagé dans une nouvelle relation conjugale avec cette personne après qu'un mariage antérieur ou une relation de conjoints de fait ou de partenaires conjugaux antérieure avec celle-ci a été dissous principalement en vue de lui permettre ou de permettre à un

could acquire any status or  
privilege under the Act.

autre étranger ou au répondant  
d'acquérir un statut ou un  
privilège aux termes de la Loi.

## VI. Analysis

### *Standard of review*

[8] The Officer's finding of fact that the marriage between Mr. Bahdanau and Ms. Kashkan is one of convenience is reviewable on a reasonableness standard and consequently his decision must be justifiable, transparent and intelligible within the decision-making process (*Dunsmuir v. New Brunswick*, 2008 SCC 9), and should be vacated only if perverse, capricious, not based on the evidence or based on an important mischaracterization of material facts. But on the other hand, a breach of procedural fairness is cause to set the resultant decision aside, unless there is no possible way that another outcome could have been reached.

### *Marriage of convenience*

[9] The Officer focused on the facts surrounding the breakdown in the relationship between Mr. Bahdanau and Ms. Kashkan, ignoring the evidence that they had been married and lived together for four years in Belarus prior to their immigration to Canada.

[10] The Officer also mischaracterized the evidence by stating several times that Mr. Bahdanau and his sons were sponsored to Canada by Ms. Kashkan while in fact the couple immigrated to Canada as independent immigrants. Their marriage occurred long before Ms. Kashkan had any status in Canada. The Officer's decision indicates that the motive ascribed to this marriage is based

on a misapprehension of the evidence. The Officer also appears to have ignored the evidence about the cause of the marital breakdown.

[11] Those are important facts that the Officer appears to have ignored or mischaracterized. Consequently the Court cannot conclude, as does the respondent, that these errors are immaterial and that the Officer could not have concluded differently had he analyzed and weighed the proof properly.

[12] Seeing that the Officer apparently ignored Mr. Bahdanau and Ms. Kashkan's evidence that they had been married and lived together for four years in Belarus prior to their immigration to Canada, and ignored also the cause of their marriage's failure, the Court concludes that the Officer mischaracterized the evidence by deciding that Mr. Bahdanau had married Ms. Kashkan because she was able to get permanent resident status for him. This mischaracterization of the means by which Mr. Bahdanau gained status as sponsorship rather than dependency is a crucial one that seems to have influenced negatively the prism through which the Officer viewed the entire file.

[13] Such an error is sufficiently important to render the decision that followed unreasonable without the necessity to address the other issue concerning the alleged breach of procedural fairness. For these reasons, this Court concludes that the Officer committed a reviewable error, by ignoring important material facts that lead to a mischaracterization of the means by which the applicant gained status and this error is such that it renders his decision unreasonable. Therefore, the judicial review will be allowed and the decision will be set aside.

[14] The Court agrees with the parties that there is no question of general interest to certify.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** the application is allowed, the decision dated February 12, 2008, is set aside, and the matter is referred to another Immigration Officer for rehearing.

“Maurice E. Lagacé”  
\_\_\_\_\_  
Deputy Judge

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

**DOCKET:** IMM-1097-08

**STYLE OF CAUSE:** IRYNA BAHDANAVA v. THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** NOVEMBER 18, 2008

**REASONS FOR JUDGMENT  
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