

Date: 20090416

Docket: IMM-3943-08

Citation: 2009 FC 384

Ottawa, Ontario, April 16, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ELISHA MUGU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to s. 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of two decisions of different Officers of Citizenship and Immigration Canada out of Accra, Ghana. One decision was made by Officer Tieman, dated April 11, 2008 and amended February 6, 2009 dealt with the Applicant's permanent residence application and the other by Officer Riley on April 25, 2008, dealt with the Applicant's permanent residence application. Both Decision #1 and Decision #2 refused the Applicant's application for permanent residence pursuant to paragraph 40 of the Act.

BACKGROUND

[2] The Applicant is the same-sex conjugal partner of Troy Stilwell, a Canadian Citizen. He and Mr. Stilwell have shared a conjugal partner relationship for over seven years since their meeting in July, 2001.

[3] In September 2005, the Applicant filed a sponsorship application for permanent residence as the conjugal partner of Mr. Stilwell. He was interviewed in relation to this application on September 28, 2006 at the Canadian High Commission in Accra, Ghana by Officer Riley.

[4] During the interview, the Applicant allegedly told Officer Riley that he had applied for temporary resident visas to visit Mr. Stilwell in 2001, 2003 and 2007.

[5] At the Applicant's interview, he was questioned about his previous passport which was issued in 2003 under the name of Elisha Bivan. The Applicant explained that his passport was stolen from his car in 2002 and he applied for a new passport under the name Elisha Mugu because he did not want to use the same name on his previous stolen passport. The Applicant's full name is Elisha Bivan Mugu and he submitted a birth certificate to the High Commission which showed those names.

[6] The Applicant was requested to bring police reports to substantiate the loss of his passport and his name change to the High Commission. The Applicant alleges that he obtained reports

dealing with his change of name and the loss of his passport and submitted them to the High Commission in December 2007. He also alleges that he submitted an affidavit of change of name and an advertisement describing the name change that appeared in a newspaper, along with a police extract about his changed name and lost passport.

[7] After the Applicant obtained the police reports, he says he realized that they contained some inaccuracies concerning the date of the lost passport. Obtaining police reports in Nigeria is difficult and expensive, so the Applicant allegedly did not have the “energy or financial resources to return to the police to correct the report.”

[8] In May 2008, the Applicant received a letter from Officer Riley refusing his application for permanent residence.

[9] In July 2008, the Applicant received a letter from Officer Tieman refusing his application for a temporary resident visa on the basis of misrepresentation with regard to the information provided during his interview with Officer Riley in September 2006. The Applicant assumed that the letter related to his 2007 temporary residence visa application.

[10] On September 8, 2008, an application for Leave and Judicial Review was filed challenging Officer Tieman’s Decision that dealt with the application for temporary residence and inadmissibility on the basis of misrepresentation. An Application Record was filed with the Court

on November 19, 2008. A Notice of Appeal was filed with the Immigration Appeal Division (IAD) appealing the refusal of the permanent resident application on July 24, 2008.

[11] The Applicant was advised that on December 19, 2008, the Department of Justice had responded with a Memorandum of Argument and an Affidavit of Officer Tieman defending his refusal of the temporary resident visa. Leave was granted on January 13, 2009. The Respondent delivered a certified copy of the Record on January 28, 2009.

[12] The Department of Justice advised the Applicant on February 3, 2009 that the matter was statutorily barred because an appeal had been filed with the Immigration Appeal Division. On February 4, 2009, the Applicant responded by stating that the present application was a challenge of a decision refusing the Applicant's application for a temporary resident visa.

[13] On February 4, 2009, the Respondent withdrew its objection that the application was statutorily barred and provided an amended certified record which was served and filed on February 6, 2009. On February 5, 2009, the Respondent advised that the Decision rendered by Officer Tieman contained an error and it did not relate to the Applicant's temporary resident visa application. It related to an application for a permanent resident visa. The two decisions were issued because Officer Riley did not have the authority to determine that the Applicant was inadmissible for misrepresentation.

DECISION UNDER REVIEW

The Decision of Officer Tieman

[14] Officer Tieman, in his original letter of April 11, 2008, determined that the Applicant did not qualify for the issuance of a temporary resident visa to Canada. An amended letter was issued on February 6, 2009 to fix the clerical error and change the letter to say that the Applicant did not qualify for permanent residence in Canada.

[15] Officer Tieman relied upon paragraph 40(1)(a) of the Act, which states that a foreign national is inadmissible for misrepresentation for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of the Act. Officer Tieman also relied upon paragraph 40(2)(a) which specifies that a foreign national continues to be inadmissible for misrepresentation for a period of two years following, in the case of a determination outside of Canada, a final determination of inadmissibility under subsection(1).

[16] Officer Tieman pointed to the interview with Officer Riley on September 28, 2006 where the Applicant “misrepresented or withheld” material facts:

You stated that your previous passport, issued in the name of Elisha BIVAN, was stolen from your car in 2003. You stated that you had in your possession two police reports, which you were prepared to submit to our office in support of this statement. You furthermore stated that you had changed your name from Elisha BIVAN and Elish[a] MUGU because this passport had been stolen. You were then issued a letter requesting, among other documents, that you

submit the two original police reports from the time when your passport was misplaced and then stolen.

[17] Officer Tieman pointed out that the documents the Applicant submitted in response to the request of Officer Riley were received on December 4, 2006 and did not include the two police reports requested. Officer Tieman noted that the Applicant submitted a police report obtained on October 18, 2006, which was after the date of his interview. Officer Tieman stated that the police report did not match what the Applicant had said in the interview, namely that his passport was misplaced and stolen in 2003.

[18] Officer Tieman stated that the Applicant had been sent a letter dated September 28, 2007, which allowed him another opportunity to respond and provide information to overcome the concerns that the Applicant had misrepresented his identity and his previous immigration history. Officer Tieman noted that the further documents submitted were received on December 11, 2007 and did not overcome the concerns.

[19] Officer Tieman held that the misrepresentation, or withholding of a material fact, induced or could have induced errors in the administration of the Act because the misrepresentation of the Applicant's identity and previous immigration history, may have led an officer to incorrectly assess the "bona fides of [his] relationship with [his] sponsor."

[20] Officer Tieman deemed the Applicant inadmissible to Canada for a period of two years. The Officer cited subsection 11(1) of the Act, which provides that a foreign national must, before

entering Canada, apply to an officer for a visa or 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 the Act.

[21] Officer Tieman found the Applicant inadmissible and refused his application.

The Decision of Officer Riley

[22] Officer Riley cites subsection 11(1) of the Act that a foreign national must support their application with the required documents. Officer Riley says that he had reasonable grounds to believe that the Applicant had not fulfilled the requirements of subsection 16(1) of the Act:

16(1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

(1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

[23] Officer Riley referred to the September 28, 2006 interview where he believed that the Applicant had withheld or misrepresented the following information:

You stated that your previous passport, issued in the name of Elisha BIVAN, was stolen from your car in 2003. You stated that you had in your possession two police reports, which you were prepared to submit to our office in support of this statement. You furthermore stated that you had changed your name from Elisha BIVAN and Elish[a] MUGU because this passport had been stolen. You were

then issued a letter requesting, among other documents, that you submit the two original police reports from the time when your passport was misplaced and then stolen.

[24] Officer Riley went on to state that the documents the Applicant submitted in response to CIC's letter of September 28, 2006 did not include the two police reports required and that the Applicant submitted a police report obtained on October 18, 2006, which was after the date of his interview. The circumstances outlined in the report did not match the circumstances explained at the interview to the effect that the Applicant's passport had been misplaced and stolen in 2003.

[25] Officer Riley found that the Applicant had engaged in misrepresentation in submitting his application for permanent residence and that he was inadmissible because of paragraphs 40(1)(a) and 40(2)(a) of the Act.

[26] Officer Riley afforded the Applicant 60 days from the receipt of the letter to make any further representations and informed the Applicant that, if he did not respond, his application would be assessed based on the information available, which would "likely result in a refusal."

ISSUES

[27] The Applicant submits the following issues on this application:

- 1) The Decision that the Applicant is inadmissible for misrepresentation was made in breach of the principles of fairness;

- 2) The immigration counsellor [Officer Tieman] erred in finding that the Applicant misrepresented any aspect of his application;
- 3) In the alternative, if there was any misrepresentation, such misrepresentation was not material to any issue before the Officer.

[28] In his further Memorandum of Fact and Law, the Applicant raises the following additional issues:

- 1) Officer Tieman erred in refusing the Applicant's sponsored application for permanent residence on the basis that his relationship with his sponsor is not genuine;
- 2) Officer Riley erred in finding that the Applicant misrepresented any aspect of his application;
- 3) In the alternative, if there was any misrepresentation, such misrepresentation was not material to any issue before the Officers;
- 4) The Decision that the Applicant is inadmissible for misrepresentation was made in breach of the principles of fairness.

STATUTORY PROVISIONS

[29] The following provisions of the Act are applicable in these proceedings:

- | | |
|---|---|
| <p>11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by</p> | <p>11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis</p> |
|---|---|

the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation

40. (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :

(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;

a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

...

...

(2) Les dispositions suivantes s'appliquent au paragraphe (1) :

(2) The following provisions govern subsection (1):

a) l'interdiction de territoire court pour les deux ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi;

(a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of two years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and

...

...

[30] The following provisions of the OP18: Evaluating Inadmissibility, Immigration Processing Manual for Citizenship and Immigration Canada (CIC) (Manual) are also applicable in these proceedings:

9.7 At Visa Offices and Ports of Entry

An application for a visa abroad, or for entry into Canada at a port of entry may be denied based on a misrepresentation made in connection with the current application or examination only, unless the person was previously the subject of a refusal for misrepresentation and the resulting two-year inadmissibility period has not elapsed.

Failure to satisfy an officer of certain facts or intentions does not equate to misrepresentation. For example, if an officer does not find a person's stated intention to leave Canada before the expiry of the period authorized to be credible, this is not sufficient to support inadmissibility based on misrepresentation. Rather, non-compliance with paragraph A20(1)(b) would better define the situation as temporary residents must establish that they will leave Canada by the end of the period authorized for their stay.

9.7 Bureaux des visas et points d'entrée

Une demande de visa à l'étranger ou une demande d'entrée au Canada à un point d'entrée peut être refusée en raison d'une fausse déclaration faite relativement à la demande actuelle ou au contrôle uniquement, à moins que la personne ait antérieurement été l'objet d'un refus pour fausse déclaration et que la période réglementaire d'interdiction de territoire de deux ans ne soit pas écoulée.

L'impossibilité de convaincre l'agent de certains faits ou de certaines intentions n'est pas assimilable à une fausse déclaration. Par exemple, si l'agent estime que l'intention déclarée de la personne de quitter le Canada avant l'expiration de la période autorisée n'est pas crédible, cela ne suffit pas à appuyer une interdiction de territoire pour motif de fausse déclaration. En pareil cas, le non-respect de l'alinéa L20(1)b correspondrait mieux à la situation, car les résidents temporaires doivent démontrer qu'ils quitteront le

Where, on a balance of probabilities there is sufficient evidence of misrepresentation at a port of entry, officers may write a subsection A44(1) report. Officers should refer to the procedural guidelines in ENG 5 for writing reports.

Canada à la fin de la période de séjour autorisée.

Si, selon la prépondérance des probabilités, il existe une preuve suffisante de fausse déclaration à un point d'entrée, l'agent peut rédiger un rapport en application du paragraphe L44(1). L'agent doit se référer aux lignes directrices sur les procédures définies dans le ENF 5 pour rédiger ces rapports.

9.9 Visa Office Procedures

9.9 Procédure dans les bureaux des visas

An officer who suspects that an applicant may be inadmissible for misrepresentation should carefully document the reasons for the concern in their notes. They must then provide the individual with information on the basis for their concern and invite the person to respond. This can be done at an interview or in writing. If in writing, the person should be given at least 30 days from the time of receipt of the officer's notice to respond. The information provided in the response should be carefully assessed in accordance with the principles outlined previously.

L'agent qui soupçonne qu'un demandeur peut être interdit de territoire pour fausses déclarations précise clairement par écrit les motifs de ses doutes dans ses notes. Il fournit ensuite à la personne des renseignements sur le fondement de son doute et l'invite à y répondre. Cela peut se faire durant une entrevue ou par écrit. Dans ce dernier cas, la personne dispose d'un délai de réponse d'au moins 30 jours à compter de la réception de l'avis envoyé par l'agent. L'information fournie dans la réponse est soigneusement évaluée conformément aux principes dégagés précédemment.

If the officer believes that the person is inadmissible for misrepresentation, and the officer is not a designated

Si l'agent croit que la personne est interdite de territoire pour fausses déclarations et n'a pas le pouvoir d'appliquer l'article

officer for the use of section A40, then the officer refers the case to a designated officer. The decision based on section A40 is solely the decision of the designated officer who renders the decision on the basis of the information before them, including any further information or interview the designated officer feels is necessary. The designated officer enters appropriate file notes on their own assessment of the case and the factors leading to the decision. The section A40 decision is not a “concurrent” with another officer’s decision.

L40, il doit renvoyer le cas à un agent désigné. La décision prise en vertu de l’article L40 appartient uniquement à l’agent désigné qui la rend suivant l’information dont il dispose, y compris toute information ou entrevue supplémentaire qu’il juge nécessaire. L’agent désigné inscrit des notes appropriées au dossier sur sa propre évaluation du cas, ainsi que les motifs menant à sa décision. La décision prise en vertu de l’article L40 n’est pas concordante à la décision d’un autre agent.

[31] The following provisions of the OP2: Processing Members of the Family Class,

Immigration Processing Manual for CIC (Manual OP2) are also applicable in these proceedings:

5.25. Characteristics of conjugal relationships

The word “conjugal” is not defined in legislation; however, the factors that are used to determine whether a couple is in a conjugal relationship are described in court decisions.

Marriage is a status-based relationship existing from the day the marriage is legally valid until it is severed by death or divorce. A common-law relationship (and in the immigration context, a conjugal partner relationship) is a fact-based relationship

y. Caractéristiques des relations conjugales

Le mot « conjugal » n’est pas défini dans la loi; toutefois, les facteurs utilisés pour déterminer si un couple vit une relation conjugale sont exposés dans les décisions des tribunaux.

Le mariage est une relation fondée sur le statut qui existe à partir du jour où le mariage est légalement valide jusqu’au jour où il est rompu par un décès ou un divorce. Une union de fait (et dans le contexte de l’immigration, une relation entre partenaires

which exists from the day on which the two individuals can reasonably demonstrate that the relationship meets the definition set out in the Regulations. While this is a significant difference, there are many similarities in the two types of relationships. This is because of the history of the recognition in law of common-law relationships and their definition, which includes the word “conjugal.”

The term “conjugal” was originally used to describe marriage. Then, over the years, it was expanded by various court decisions to describe “marriage-like” relationships, i.e., a man and a woman in a common-law relationship.

With the *M. v. H.* decision in 1999, the Supreme Court of Canada further expanded the term to include same-sex common-law couples.

The word “conjugal” does not mean “sexual relations” alone. It signifies that there is a significant degree of attachment between two partners. The word “conjugal” comes from two Latin words, one meaning “join” and the other meaning “yoke,” thus,

conjugaux) est une relation fondée sur les faits qui existe à partir du jour où les deux personnes peuvent démontrer de façon raisonnable que la relation correspond à la définition établie dans le *Règlement*. Même si la différence est importante, il existe de nombreuses similitudes entre les deux types de relation, en raison de l’histoire de la reconnaissance en droit des unions de fait et de leur définition qui comprend le mot « conjugal ».

Le terme « conjugal » était à l’origine utilisé pour décrire le mariage, puis, au cours des années, différentes décisions des tribunaux ont permis d’élargir sa définition pour inclure les relations « semblables à un mariage », c’est-à-dire des unions de fait entre conjoints hétérosexuels.

Dans sa décision *M. c. H.* de 1999, la Cour suprême du Canada a élargi la définition pour y inclure les unions de fait entre conjoints de même sexe.

Le terme « conjugal » n’a pas seulement trait aux « relations sexuelles ». Il suppose un degré d’attachement important entre deux partenaires. Le mot « conjugal » vient de deux mots latins dont l’un signifie « joindre » et l’autre signifie «

literally, the term means “joined together” or “yoked together.”

attelage », donc le terme signifie littéralement « joints ensemble » ou « attelés ensemble ».

In the *M. v. H.* decision, the Supreme Court adopts the list of factors that must be considered in determining whether any two individuals are actually in a conjugal relationship from the decision of the Ontario Court of Appeal in *Moldowich v. Penttinen*.

Dans la décision *M. c. H.*, la Cour suprême adopte une liste de facteurs qui doivent être pris en compte pour déterminer si deux personnes vivent réellement une relation conjugale, qu’elle a tirée de la décision *Moldowich c. Penttinen* de la Cour d’appel de l’Ontario. Ces facteurs comprennent :

They include:

- shared shelter (e.g., sleeping arrangements);

logement commun (p. ex. ententes relatives au couchage);

- sexual and personal behaviour (e.g., fidelity, commitment, feelings towards each other);

- comportement sexuel et personnel (p. ex. fidélité, engagement, sentiments l’un envers l’autre);

- services (e.g., conduct and habit with respect to the sharing of household chores)

- services (p. ex. comportement et habitudes concernant la répartition des tâches ménagères);

- social activities (e.g., their attitude and conduct as a couple in the community and with their families);

- activités sociales (p. ex. attitude et comportement en tant que couple au sein de la collectivité et avec leurs familles);

- economic support (e.g., financial arrangements, ownership of property);

- soutien économique (p. ex. ententes financières, propriété de biens);

- children (e.g., attitude and conduct concerning children)

- enfants (p. ex. attitude et comportement vis-à-vis les enfants);

- the societal perception of the two as a couple.

From the language used by the Supreme Court throughout *M. v. H.*, it is clear that a conjugal relationship is one of some permanence, where individuals are interdependent – financially, socially, emotionally, and physically – where they share household and related responsibilities, and where they have made a serious commitment to one another.

Based on this, the following characteristics should be present to some degree in **all** conjugal relationships, married and unmarried:

- mutual commitment to a shared life;
- exclusive – cannot be in more than one conjugal relationship at a time;
- intimate – commitment to sexual exclusivity;
- interdependent – physically, emotionally, financially, socially;
- permanent – long-term, genuine and continuing relationship;
- present themselves as a couple;

- perception sociale des partenaires en tant que couple.

Si l'on considère les termes employés par la Cour suprême au cours de l'affaire *M. c. H.*, il est clair qu'une relation conjugale suppose une certaine permanence, une interdépendance financière, sociale, émotive et physique, un partage des responsabilités ménagères et connexes, ainsi qu'un engagement mutuel sérieux.

En se fondant sur ces facteurs, les caractéristiques suivantes devraient être présentes, à un certain degré, dans **toutes** les relations conjugales, que les conjoints soient mariés ou non :

- engagement mutuel à une vie commune;
- exclusivité – on ne peut vivre plus d'une relation conjugale en même temps;
- intimité – engagement envers une exclusivité sexuelle;
- interdépendance – physique, émotive, financière et sociale;
- permanence – relations authentiques constantes à long terme;
- les conjoints se présentent comme un couple;

- regarded by others as a couple;

- caring for children (if there are children).

People who are dating or who are thinking about marrying or living together and establishing a common-law relationship are NOT yet in a conjugal relationship, nor are people who want to live together to “try out” their relationship.

Persons in a conjugal relationship have made a significant commitment to one another. A married couple makes the commitment publicly at a specific point in time via their marriage vows and ceremony, and the marriage certificate and registration is a record of that commitment. In a common-law or conjugal partner relationship, there is not necessarily a single point in time at which a commitment is made, and there is no one legal document attesting to the commitment.

Instead, there is the passage of time together, the building of intimacy and emotional ties and the accumulation of other types of evidence, such as naming one another as beneficiaries of insurance

- les partenaires sont considérés comme un couple;

- le couple prend soin des enfants ensemble (le cas échéant).

Les personnes qui sortent ensemble ou qui pensent à se marier, à vivre ensemble pour fonder une union de fait ou à vivre ensemble pour « tester » leur relation ne vivent PAS encore une relation conjugale. Les personnes qui vivent une relation conjugale ont pris un engagement mutuel sérieux.

Un couple marié prend cet engagement publiquement au moment précis où il prononce ses vœux de mariage pendant la cérémonie. Le certificat et l’enregistrement de mariage sont des preuves de cet engagement. En ce qui concerne l’union de fait ou la relation entre partenaires conjugaux, il n’y a pas nécessairement d’engagement pris à un moment précis, et il n’existe aucun document légal témoignant d’un engagement.

En revanche, il y a le temps que le couple a passé ensemble, les liens intimes et émotionnels qu’ils ont créés et l’accumulation d’autres types de preuve, comme le fait de se désigner mutuellement

policies or estates, joint ownership of possessions, joint decision-making with consequences for one partner affecting the other, and financial support of one another (joint expenses or sharing of income, etc. When taken together, these facts indicate that the couple has come to a similar point as that of a married couple – there is significant commitment

bénéficiaires de régimes d'assurance ou d'un testament, la possession de biens en commun, la prise en commun de décisions pouvant avoir des répercussions sur les deux partenaires et le soutien financier mutuel (dépenses communes, partage des revenus, etc.). Si on les combine, ces faits montrent que le couple est au même point qu'un couple marié; il y a engagement sérieux et interdépendance dans une relation monogame d'une certaine permanence.

5.26. Assessment of conjugal relationships

The following are key elements that officers may use to establish whether a couple is in a conjugal relationship. These apply to spouses, common-law partners and conjugal partners.

a) Mutual commitment to a shared life to the exclusion of all other conjugal relationships

A conjugal relationship is characterized by mutual commitment, exclusivity, and interdependence and therefore cannot exist among more than two people simultaneously. The word “conjugal” includes the requirement of monogamy and, therefore, an individual cannot be in more

5.26. Évaluation des relations conjugales

Voici les principaux éléments qui pourraient permettre aux agents d'établir si un couple vit une relation conjugale. Ils s'appliquent aux époux, aux conjoints de fait et aux partenaires conjugaux.

a) Engagement mutuel à une vie commune à l'exclusion de toute autre relation conjugale

Une relation conjugale se caractérise par un engagement mutuel, une exclusivité et une interdépendance, et ne peut donc unir plus de deux personnes simultanément. Le terme « conjugal » comporte l'exigence de la monogamie et, de ce fait, un individu ne peut pas avoir plus d'une relation

than one conjugal relationship at one time. For example, a person cannot have a conjugal relationship with a legally married spouse and another person at the same time. Nor can a person have a conjugal relationship with two unmarried partners at the same time. These would be polygamous-like relationships and cannot be considered conjugal.

This does not, however, require that an individual in an unmarried conjugal relationship be divorced from a legally married spouse. See: What happens if the common-law partner (principal applicant) is married to another person, section 5.38 below.

The requirement of exclusivity or monogamy applies in equal measure to marriage, common-law partnership and conjugal partnership. Thus, the common-law and conjugal partner categories cannot be used to get around restrictions related to bigamy and polygamy (See section 13.2 Polygamous marriages below for further information). By the same token, common-law and conjugal partner relationships are not expected to be any more exclusive than ordinary married relationships.

conjugale à la fois. Par exemple, une personne ne peut vivre une relation conjugale avec l'époux auquel il est marié et avec une autre personne en même temps. Une personne ne peut non plus vivre une relation conjugale avec deux partenaires non mariés en même temps. Il s'agirait de relations polygames, qu'on ne peut assimiler à une relation conjugale.

On n'exige cependant pas qu'une personne qui vit une relation conjugale sans être mariée à son conjoint qu'elle divorce de la personne à laquelle elle était mariée. Voir Que se passe-t-il si le conjoint de fait (demandeur principal) est marié à une autre personne, section 5.38 ci-dessous.

L'exigence de l'exclusivité ou de la monogamie s'applique de façon égale au mariage, à l'union de fait et à la relation entre partenaires conjugaux. Les catégories de l'union de fait et de l'union conjugale ne peuvent donc pas être utilisées pour contourner les restrictions relatives à la bigamie et à la polygamie (pour de plus amples informations, voir la section 13.2 Mariages polygames ci-dessous). En outre, l'union de fait et la relation entre partenaires conjugaux n'ont pas à être plus

Proof of exclusivity is not usually required in the assessment of these relationships any more than it would be in assessing a marriage.

b) Interdependent – physically, emotionally, financially, socially

The two individuals in a conjugal relationship are interdependent – they have combined their affairs both economically and socially. The assessment of whether two individuals are in a conjugal relationship should focus on evidence of interdependency. The following list is a set of elements which, when taken together or in various combinations, may constitute evidence of interdependency. It should be kept in mind that these elements may be present in varying degrees and not all are necessary for a relationship to be considered conjugal.

Factor Details

Financial aspects of the relationship

- Joint loan agreements for real estate, cars, major household appliances;

exclusives que les mariages ordinaires. On n'exige généralement pas plus de preuves d'exclusivité dans l'évaluation de ces relations qu'on ne le ferait pour évaluer un mariage.

b) Interdépendance – physique, émotive, financière et sociale

Les deux personnes qui vivent une relation conjugale sont interdépendantes – elles ont combiné leurs activités économiques et sociales. Pour évaluer si deux personnes vivent une relation conjugale, il faut chercher une preuve d'interdépendance. La liste ci-dessous établit un ensemble d'éléments qui, pris ensemble ou selon des combinaisons diverses, peuvent constituer des preuves d'interdépendance. Il ne faut pas oublier que ces éléments peuvent être présents à divers degrés et ne sont pas tous nécessaires pour qu'une relation soit considérée comme une relation conjugale.

Facteur Détails

Aspects financiers de la relation

- Contrats de prêt conjoint pour des biens immobiliers, des voitures ou d'importants électroménagers;

- Joint ownership of property, other durable goods;
- Propriété conjointe de biens immeubles ou autres biens durables;
- Operation of joint bank accounts, joint credit cards evidence that any such accounts have existed for a reasonable period of time;
- Comptes de banque conjoints; cartes de crédit conjointes preuve que ces comptes existent depuis un bon moment;
- The extent of any pooling of financial resources, especially in relation to major financial commitments;
- Étendue de la mise en commun des ressources financières, surtout en ce qui a trait à des engagements financiers importants.
- Whether one party owes any legal obligation in respect of the other. Social aspects of the relationship
- Un des conjoints a-t-il des obligations juridiques envers l'autre?
Aspect social de la Relation
- Evidence that the relationship has been declared to government bodies and commercial or public institutions or authorities and acceptance of such declarations by any such bodies;
- Preuve que la relation a été déclarée aux organismes gouvernementaux et aux institutions ou autorités commerciales ou publiques et acceptation de ces déclarations par ces organismes;
- Joint membership in organisations or groups, joint participation in sporting, cultural, social or other activities;
- Appartenance conjointe à des organisations ou à des groupes, participation conjointe à des activités sportives, culturelles, sociales ou autres;
- Joint travel;
- Voyage commun;
- Shared values with respect to how a household should be managed;
- Valeurs communes en ce qui a trait à la gestion du ménage;

- Shared responsibility for children; shared values with respect to child-rearing; willingness to care for the partner's children;

- Partage des responsabilités envers les enfants; valeurs communes en ce qui a trait à l'éducation des enfants; volonté de prendre soin des enfants de l'autre;

- Testimonials by parents, family members, relatives or friends and other interested parties about the nature of the relationship and whether the couple present themselves to others as partners. Statements in the form of statutory declarations are preferred.

- Témoignages de parents, de membres de la famille, de membres de la parenté ou d'amis et autres parties intéressées sur la nature de leur relation et sur le fait que le couple se présente aux autres comme des partenaires. Les témoignages sous forme d'affirmation solennelle sont privilégiés.

Physical and emotional aspects of the relationship -the degree of commitment as evidenced by:

Aspects physiques et émotifs de la relation - le degré d'engagement que représentent :

- Knowledge of each other's personal circumstances, background and family situation;

- La connaissance de la situation personnelle, du passé et de la situation familiale de l'autre;

- Shared values and interests;

- Les valeurs et intérêts communs;

- Expressed intention that the relationship will be long term;

- L'intention exprimée que la relation durera;

- The extent to which the parties have combined their affairs, for example, are they beneficiaries of one another's insurance plans, pensions, etc.?

- La mesure dans laquelle les parties ont combiné leurs affaires, par exemple, se sont-ils mutuellement désignés comme bénéficiaires des régimes d'assurance ou de retraite?

- Joint decision-making with consequences for one partner affecting the other;

- La prise de décision conjointe lorsque les conséquences pour un des partenaires touchent l'autre;

- Support for each other when ill and on special occasions letters, cards, gifts, time off work to care for other; The terms of the parties' wills made out in each other's favour provide some evidence of an intention that the relationship is long term and permanent;

- S'offrent-ils mutuellement du soutien lorsqu'ils sont malades ou à des occasions spéciales - lettres, cartes, cadeaux, congé pour prendre soin de l'autre;
- Les dispositions testamentaires des parties établies en faveur de l'autre fournissent la preuve que les partenaires ont l'intention d'avoir une relation durable et permanente;

- Time spent together;

- Le temps passé ensemble;

- Time spent with one another's families;

- Le temps passé avec leurs familles respectives.

- Regular and continuous communication when apart.

- Une communication régulière et continue lorsqu'ils sont séparés

Examples of supporting documents:

Exemples de documents à l'appui

- Family memberships, medical plans, documentation from institutions that provides recognition as a couple;

- L'adhésion familiale à un régime de soins médicaux, la documentation fournie par les institutions qui prouve qu'il s'agit d'un couple;

- Marriage certificate (not just a solemnization record), wedding invitations, commitment ceremony (certificate, invitations), domestic partnership certificate;

- Certificat de mariage (pas seulement un dossier de solennisation), faire-part, cérémonie d'engagement (certificat, invitations), certificat d'union libre;

- joint ownership of possessions, joint utility bills, lease/rental agreement, joint mortgage/loan, property title, joint bank statements; money transfers.

- documents showing travel together, long distance phone bills; other proof of continuous communication (emails, internet chat site printouts, letters).

- insurance policies (documents naming the partner as a beneficiary), wills, powers of attorney;

- significant photographs;

- statements of support from families, bank manager, employers, financial professionals, religious leaders, community leaders, professors, teachers or medical professionals.

The above elements may be present in varying degrees and not all are necessary for a relationship to be considered conjugal. Whether an element is present may depend on the culture or preferences of the couple. For example, in some cultures, women have a limited role in the management of the family finances; thus there may not be joint ownership of

- Propriété commune de biens, factures de services publics communes, entente de location commune, hypothèque ou prêt conjoint, titre de propriété, relevés bancaires conjoints, transferts monétaires;

- Documents faisant état de voyage ensemble, factures d'interurbain, autres preuves de communication continue (courriels, imprimés de bavardage en ligne, lettres);

- Polices d'assurance (où le partenaire est inscrit comme bénéficiaire), testaments, procurations écrites;

- Photographies pertinentes;

- Déclarations de soutien de la famille, de gestionnaires de banque, d'employeurs, des professionnels financiers, de chefs religieux, de dirigeants communautaires, de professeurs, d'enseignants ou de professionnels de la santé.

Les éléments ci-dessus peuvent être présents à divers degrés et ne doivent pas nécessairement être tous présents pour qu'une relation soit conjugale. La présence d'un élément peut dépendre de la culture ou des préférences du couple. Par exemple, dans certaines cultures, les femmes ont un rôle limité quant à la

property or joint bank accounts. Some couples may choose to keep aspects of their financial affairs separate and yet are clearly in a conjugal relationship and have merged their affairs in other respects. Officers should consider each relationship individually and take into account any other relevant information provided by the applicant (or information otherwise available to the officer), in order to assess whether a conjugal relationship exists.

Officers should also take into account to what extent the laws and/or traditions of the applicant's home country may discourage the parties from openly admitting the existence of the relationship.

gestion des finances de la famille, c'est pourquoi il peut ne pas y avoir de propriété conjointe des biens immeubles ni de comptes de banque conjoints. Certains couples peuvent choisir de ne pas fusionner les affaires financières, et pourtant ils vivent une relation conjugale et ont fusionné leurs activités à d'autres égards.

Les agents doivent examiner chaque union individuellement et tenir compte de toute autre information pertinente fournie par le demandeur (ou autres informations dont disposent les agents), afin d'évaluer s'il est en présence d'une relation conjugale.

Les agents doivent également tenir compte de la mesure dans laquelle les lois et (ou) les traditions du pays d'origine du demandeur peuvent dissuader les parties d'admettre ouvertement l'existence de leur relation.

STANADARD OF REVIEW

[32] The Applicant submits that this application raises issues that are subject to review using the standard of reasonableness: *Dunsmuir v. New Brunswick* 2008 SCC 9 (*Dunsmuir*) at paragraph 47.

[33] On issues of credibility, the pre-*Dunsmuir* standard of review was patent unreasonableness: *Hou v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1586 at paragraph 13 and *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (F.C.A.) at paragraph 4.

[34] When deciding whether someone is a member of the family class, the pre-*Dunsmuir* standard of review was patent unreasonableness: *Kazi v. Canada (Minister of Citizenship and Immigration)* 2008 FC 295 at paragraph 20; *Abdilahi v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1431 and *Sharief v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 386 (F.C.T.D.).

[35] Whether a person is actually in a common-law relationship or not is a question of fact and has, pre-*Dunsmuir*, been subject to the standard of patent unreasonableness: *Vehniwal v. Canada (Minister of Citizenship and Immigration)* 2007 FC 279 at paragraph 12 and *Slawinski v. Canada (Minister of Citizenship and Immigration)* 2007 FC 1205 at paragraph 8.

[36] When dealing with the standard of review for misrepresentations, *Koo v. Canada (Minister of Citizenship and Immigration)* 2008 FC 931 provides as follows:

20 In *Bellido v. Canada (MCI)*, 2005 FC 452, 138 A.C.W.S. (3d) 728, Madam Justice Snider dealt with the issue of inadmissibility pursuant to s. 40(1) of the *Act*. She held that there were two essential elements to a finding of inadmissibility, namely that the misrepresentations must have been made by the applicant and the misrepresentations must be material in that they could have induced

an error in the administration of the *Act*. She also determined that the standard of review for the first portion of the test was patent unreasonableness, whereas the standard for the second part was reasonableness *simpliciter*. As a result of the decision reached by the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, 329 N.B.R. (2d) 1, I believe the standard of review for both legs of the test must now be reasonableness. As a result, this Court shall intervene only if the decision does not fall “within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, par. 47).

[37] In *Dunsmuir*, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, “the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review”: *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of “reasonableness” review.

[38] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[39] In light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the issues raised in this application, except procedural fairness, is reasonableness. When reviewing a decision on the

standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

[40] The Applicant has also raised a procedural fairness issue to which the standard of review is correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1.

ARGUMENT

The Applicant

Breach of Fairness

[41] The Applicant submits that there was a breach of procedural fairness in the present case for the following reasons:

- 1) The officer who determined the Applicant to be inadmissible for misrepresentation was not a designated officer for the purpose of making the decision;
- 2) The fact that the officer who determined the Applicant to be inadmissible for misrepresentation was not the officer who conducted the interviews and collected information from the Applicant breached the rule of fundamental justice that “he

who hears must decide.” See: *Patel v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1423 (F.C.T.D.) (*Patel*) at paragraph 33.

[42] However, at the hearing of this matter in Toronto, the Applicant withdrew his procedural fairness grounds of review because recent changes in the record clarify that Officer Riley made a decision to exclude the Applicant for misrepresentation which was then endorsed by Officer Tieman, who had the delegated authority to exclude.

Credibility Concerns do not in Themselves Amount to Misrepresentation

[43] The Applicant submits that he did not misrepresent his identity and that he presented his birth certificate under the name of “Elisha Bivan Mugu” and a passport under the name of Elisha Mugu. He also provided a police clearance under the name of Elisha Mugu. The Applicant notes that the authenticity of these documents was not questioned and neither was any aspect of his identity. Therefore, there was no basis for the Officer’s statement that the Applicant “misrepresented” his identity.

[44] The Applicant also submits that there was no misrepresentation about his previous immigration history and immigration officials failed to explain how his previous immigration history was misrepresented. Hence, the permanent residence denial is unreasonable since it is not transparent or intelligible: *Dunsmuir* at paragraph 47.

[45] The Applicant concedes that there were doubts about his explanation regarding his previous passport. However, these doubts do not amount to misrepresentation. General concerns regarding credibility do not constitute misrepresentation. The Applicant cites section 9.7 of the Manual, which states that a failure to satisfy an officer of certain facts or intentions does not equate to misrepresentation. The Applicant submits that the immigration officials were not satisfied with the Applicant's explanation for the loss of his passport. This was not a misrepresentation.

[46] The Applicant also submits that an error was made by the Officers in confusing a minor credibility concern with misrepresentation. This is an error in law. As well, the concerns regarding the circumstances described in the police report over the loss of the Applicant's passport can be explained: the Applicant's passport was in a car that was stolen from the Applicant while he was traveling from Wuse II and Maitama. The Applicant was not able to explain this perceived inconsistency because he did not meet with Officer Tieman, who determined him to be inadmissible for misrepresentation.

No Materiality

[47] The Applicant submits in the alternative that, if there was misrepresentation, then it was not material. It is trite law that the test under section 40 of the Act requires that a misrepresentation be material: *Ali v. Canada (Minister of Citizenship and Immigration)* 2008 FC 166.

[48] The Applicant submits that, even if he misrepresented his identity, which is denied, the alleged misrepresentation was not material to the *bona fides* of his relationship with his sponsor. Whether the Applicant is Elisha Bivan or Elisha Mugu, there was ample evidence demonstrating the *bona fides* of his relationship with his sponsor, which is revealed in the CAIPS notes where Officer Riley found the relationship to be genuinely committed.

[49] The Applicant notes that there is no explanation provided as to how he allegedly misrepresented his previous immigration history. That previous immigration history was not material to the *bona fides* of his relationship to his sponsor. Therefore, he says that, even if he was responsible for a misrepresentation, such misrepresentation was not material to any issue on his application and the test under section 40 was not met.

[50] The Applicant further submits that he did not file applications under different identities. He simply omitted his middle name on his permanent residence application. This did not constitute a misrepresentation of his identity. The Applicant submits that all of the identity documents presented by him were valid, legal identity documents that were not challenged or doubted, so there was no basis to say that he had misrepresented his identity.

[51] The Applicant further says that Officer Riley's Decision that the Applicant's relationship was not genuine is not justifiable and does not fall within the range of possible, acceptable outcomes defensible on the facts and law. The Applicant alleges that he provided substantial documentary evidence that established his relationship and that, after a personal interview with the Applicant,

Officer Riley did not identify any inconsistencies nor any other credibility issues pertaining to the relationship. After the interview, Officer Riley explicitly found the relationship to be genuine. There is no logical, justifiable link between Officer Riley's concerns about the Applicant's passport/use of an abbreviated name and the existence of a genuine relationship between the Applicant and his partner.

[52] The Applicant concludes that Officer Riley's refusal is not valid in law because it refuses the application on the basis of a non-genuine relationship without addressing whether that relationship was entered into primarily for the purpose of acquiring any status or privilege under the Act. See: *Donkor v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1089; *Ouk v. Canada (Minister of Citizenship and Immigration)* 2007 FC 891 and *Khera v. Canada (Minister of Citizenship and Immigration)* 2007 FC 632.

[53] The Applicant relies upon Manual OP2 at sections 5.25 and 5.26, which identify a number of factors that establish a genuine relationship, such as financial interdependence, social perception as a couple, frequency of contact and other factors. The Applicant submits that none of these factors are absent in the Applicant's relationship. Officer Riley failed to identify any concerns regarding the evidence presented to support the relationship. The Applicant points to the test for conjugality and the case law surrounding conjugal relationships and submits that Officer Riley erred in misapplying the test for a genuine conjugal partner relationship and, therefore, erred in law.

The Respondent

[54] The Respondent submits that the two factors that must be present for a finding of inadmissibility in section 40(1) of the Act are: (1) a misrepresentation by the applicant; and (2) the misrepresentation was material and could have induced an error in the administration of the Act. The determination of the first factor is largely fact driven and both factors were subject to deference. See: *Bellido v. Canada (Minister of Citizenship and Immigration)* 2005 FC 452.

[55] The Respondent states that, in the present matter, the Applicant filed applications under different identities. His explanation for doing so was found to be lacking and gave rise to general credibility concerns regarding his identity, his admissibility and the *bona fides* of the common law relationship. These misrepresentations are material and if they had not been brought to light, they could have induced an error in the administration of the Act.

ANALYSIS

General

[56] In his application for permanent residence and his interview with Officer Riley, the Applicant provided inaccurate and inconsistent information regarding his identity and his immigration history.

[57] Officer Riley felt that these inaccuracies and inconsistencies gave rise to general credibility concerns regarding the Applicant's identity as well as the *bona fides* of his permanent residence application and his relationship with his conjugal partner and sponsor.

[58] The inaccuracies and inconsistencies were brought to the Applicant's attention by Officer Riley and he was asked to explain them and provide relevant documentation that he said was in his possession.

[59] In response, the Applicant provided documents that did not resolve the problems and, in fact, cast further doubt on his identity and general credibility.

[60] The Applicant was given full notice of these concerns as well as the legal consequences of his actions. He was provided with a fairness letter and given an opportunity to dispel the impression his own words and actions had created. He failed to do this.

[61] As an inevitable consequence, Officer Riley recommended that the Applicant's application for permanent residence be refused and that he be excluded from Canada for two years because of misrepresentation.

[62] Six months later, Officer Tieman reviewed the file and, as the person with delegated authority to determine whether a permanent resident or a foreign national outside Canada is

inadmissible for misrepresentation agreed with Officer Riley's assessment and made the final decision on misrepresentation.

[63] The Applicant now says that the credibility concerns do not amount to misrepresentation and that, in any event, even if there were misrepresentations they were not material to the *bona fides* of his relationship with his sponsor. He says that Officer Riley's Decision was unreasonable and that Officer Tieman's Decision was wrong in law.

[64] Even a bare recounting of the facts makes it clear that the Applicant is the author of his own problems. His application for permanent residence and his interview with Officer Riley gave rise to obvious inaccuracies, inconsistencies and potential misrepresentations that the Applicant was asked to clarify and resolve, but never did. His responses, in fact, gave rise to even greater concerns. He was made fully aware of the issues and given every opportunity to address them before final decisions were made.

[65] At the hearing of this matter in Toronto, the Applicant withdrew his procedural fairness grounds of review because recent changes in the record clarify that Officer Riley made a decision to exclude the Applicant for misrepresentation which was then endorsed by Officer Tieman, who had the delegated authority to exclude on the basis of misrepresentation.

Genuineness of the Relationship

[66] As regards Officer Riley's Decision, the Applicant argues that the Officer found his relationship with the sponsor genuine but then reversed it because of credibility concerns that have no real relevance to the issue of whether the relationship was genuine. He says there is no sufficient logical link between the credibility concerns and the genuineness of the relationship to render Officer Riley's Decision justifiable, intelligible and transparent within the meaning of *Dunsmuir*. In fact, based upon Justice Mosley's decision in *Ouk* at paragraphs 10-18, the Applicant says that the selection of inappropriate criteria (in the present case, the credibility concerns) to discern the genuineness of a marriage is an error of law and is reviewable on a correctness standard.

[67] In *Ouk*, Justice Mosley points out that both prongs of Regulation 4 have to be found true before a marriage will be found not to be genuine. Justice Mosley also makes it clear at paragraph 17 of *Ouk* that "It was open to the appeal panel to find that the sponsor is inadmissible for misrepresentation pursuant to section 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."

[68] The CAIPS notes in the present case make it clear that Officer Riley's conclusions about the genuineness of the relationship were provisional and that his concerns grew over time as the Applicant failed to clear up anomalies and inconsistencies.

[69] At first, Officer Riley was “reasonably satisfied that the relationship [was] genuine” but he had “strong concerns regarding the PA’s explanation of how he came to lose his previous passport and obtained his new one, while changing his name in the process.” Also, the “fact that he neglected to give complete information about his accompanying friend Faisal, even when explicitly asked, underlines my concern that PA has misrepresented his identity, and raises more general concerns about his credibility.”

[70] Officer Riley requested further documentation so that his stated concerns could be allayed. The police reports which the Applicant said he already possessed were obviously important. The Applicant submitted further documentation but it did not address the Officer’s concerns. In fact, the police report submitted was dated October 18, 2006 and only served to increase Officer Riley’s concerns.

[71] Officer Riley reviewed the situation and then came to the following conclusions:

The documents show long-term communication between the PA and spr. The photos depict them as being physically intimate. I have strong concerns, however, regarding the PA’s apparent misrepresentation regarding his passport and previous applications for visa.

At interview, the PA stated very clearly that he had filed a police report regarding his lost passport, which was the passport he had used for his previous visitor applications. He stated that he had two police reports which were with him. I requested that he submit the original police reports, and PA advised he would.

PA has now submitted a police report dated after the day of the interview, which contains different facts than those presented at interview: this police report indicates passport was last (*sic*) in the year preceding the report (e.g. 2005-2006), whereas PA stated it was

lost in 2003. Report states it was lost on transit, while PA states it was stolen from his car.

While I am satisfied that the spr and PA have been in communication for the stated period and that the spr's commitment may be genuine, I am not satisfied that the PA has not entered into the relationship primarily for the purpose of immigrating to Canada. The misrepresentation of the circumstances of his lost passport and his change of name from his previously recorded passport lead me to conclude that it is more likely than not that the change of name was done to hide PA's previous immigration history and his attempt to gain entry to Canada. The lack of consistency between the information given at interview and the information submitted since then suggest that PA was not truthfully representing the facts at the time of the interview. It is not in 2003, and then in 2005, nor that he would have claimed to have two police reports which he in fact is not able to produce.

The misrepresentation of these material facts regarding his lost passport might have misled the officer into incorrectly assessing the bona fides of PA's application and the genuineness of the relationship.

Procedural fairness letter sent to the applicant today, copy kept on file. PA has 60 days to respond.

PA has submitted documents for an official name change, dated 2007. This is inconsistent with his claim at interview, that he changed his name after losing his pervious (*sic*) passport and obtaining his current one. The name-change documents appear to have been obtained for the purpose of responding to my concerns letter.

PA has also submitted another copy of the police report which was obtained after the date of the interview, at which he claimed he already had a police report.

The documents and information submitted do not overcome my concern.

The applicant's apparent misrepresentation of his identity and his previous history with Immigration Canada undermines the credibility of his application.

While the sponsor appears to be genuinely committed to the relationship, I am not satisfied that the appl did not enter into the relationship primarily for the purpose of immigration (*sic*) to Canada.

BASED ON THE BALANCE OF PROBABLITIES (*sic*), I AM NOT SATISFIED THAT THE APPLICANT DID NOT DIRECTLY OR INDIRECTLY MISREPRESENT A MATERIAL FACT (INFORMATION REGARDING PREVIOUS PASSPORT AND NAME CHANGE) RELATING TO A RELEVANT MATTER (ALTERNATE IDENTITY AND VISA APPLICATION) THAT COULD HAVE INDUCED AN ERROR IN THE ADMINISTRATION OF IRPA AS IT COULD HAVE LED AN OFFICER TO INCORRECTLY ASSESS THE BONAFIDES OF THE RELATIONSHIP AS WELL AS INCORRECTLY ASSESS WHETHER THE APPLICANT IS INADMISSIBLE TO CANADA (BACKGROUND CHECKS).

APPLICANT IS INADMISSIBLE TO CANADA FOR TWO YEARS FROM THIS DATE AS PER A40(1).

[72] I do not think it can be said that Officer Riley accepted the genuineness of the relationship but then rejected the application over unrelated credibility concerns.

[73] Officer Riley was prepared to give the relationship issue “the benefit of the doubt” but he expected the Applicant to allay his concerns and, as the notes show, those concerns were that “the sponsor appears to be genuinely committed to the relationship” but Officer Riley “was not satisfied that the Applicant did not enter into the relationship primarily for the purpose of immigration to Canada.

[74] When Officer Riley’s Decision and reasons are examined in total it seems clear that he felt:

- a. There was no genuine conjugal relationship because, notwithstanding the documentation that supported the relationship, it was only the sponsor who was genuinely committed; and
- b. The Applicant had entered into the relationship primarily for the purpose of immigration to Canada.

[75] Of course, Officer Riley had to base these conclusions on the evidence that was before him. Both conclusions are based upon a continuous and unresolved credibility concern that relates to the factors described by Officer Riley in his reasons. In the end, Officer Riley could not accept the genuineness of the relationship because “while the sponsor appears to be genuinely committed to the relationship, I am not satisfied that the appl did not enter into the relationship primarily for the purpose of immigration to Canada.”

[76] He is saying, in effect, that a relationship that is one-sided (the sponsor may be genuinely committed but the Applicant is not) cannot be genuine. He uses the Applicant’s motive for entering into the relationship (primarily for purposes of immigration to Canada and the second prong of the test under Regulation 4) as the reason why he does not regard the relationship as genuine. I think he is also saying that he cannot accept the relationship as genuine because he has general credibility concerns about the Applicant, as explained in his reasons, which cause him to doubt what the Applicant says about his commitment to the relationship. It is clear from the CAIPS notes that this general credibility concern was based upon the Applicant’s demeanor at the interview and the inconsistencies in his answers and in the documentation produced.

[77] So the issues before me are:

- a. Was the general negative credibility finding reasonable?
- b. Can a general negative credibility finding be used to satisfy both prongs of Regulation 4?

[78] Based upon the Applicant's answers at the interview, and the inconsistencies in his documentation and subsequent behavior (particularly as regards the police reports and how he came to lose his passport) I cannot say that it was unreasonable, within the meaning of *Dunsmuir*, for Officer Riley to find that the Applicant lacked credibility.

[79] It also seems to me that such a general credibility finding is relevant to the genuineness of the relationship, which the Officer thought was one-sided. Officer Riley did not neglect to examine and comment upon the other factors that supported the genuineness of the relationship but, in the end, he could not accept that the Applicant was committed.

[80] In addition, there was an adequate evidentiary basis for the Officer to suspect the Applicant's motives and to conclude that his primary purpose in entering into the relationship was immigration to Canada.

[81] So I do not think the Officer committed an error of law in selecting and using inappropriate criteria to discern the genuineness of the marriage. If the Officer could not believe the Applicant,

then I do not see how he can be satisfied that the relationship was genuine. Nor do I think that Officer Riley's Decision under Regulation 4 was otherwise unreasonable.

[82] It has long been accepted by this Court that the primary fact-finder is in the best position to evaluate credibility. See *Aguebor v. Canada (Minister of Citizenship and Immigration)*, [1993] F.C.J. No. 732 (F.C.A.).

[83] I also think it is well established that a negative finding of credibility can be extended to all relevant evidence. See *Hamid v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1427 (F.C.T.D.) at paragraphs 6-7.

[84] As the Respondent points out, the Officer found untruths, inconsistencies and contradictions in the Applicant's answers at the interview that were further compounded by anomalies in the documentation he submitted after the interview, and which greatly affected his credibility and considerably reduced, or even eliminated, the weight to be placed on all of his evidence. As the Federal Court of Appeal pointed out in *Sheikh v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 238 (F.C.A.) at p. 244, a general finding of lack of credibility on the part of an applicant may extend to all relevant evidence emanating from his testimony.

Misrepresentation

[85] The Applicant says that general credibility concerns cannot amount to a misrepresentation under section 40 of the Act. He says the evidence before Officer Riley did not elevate credibility concerns to a section 40 misrepresentation.

[86] The Applicant points to section 9 of the Respondent's own manual, ENF 2/OP, which deals with misrepresentation in the context of inadmissibility. In particular he points to the following:

It must be recognized that honest errors and misunderstandings sometimes occur in completing application forms and responding to questions. While in many cases it may be argued that a misrepresentation has technically been made, reasonableness and fairness are to be applied in assessing these situations.

[87] The Applicant suggests that the misrepresentations identified by Officer Riley with regards to his identity and his immigration history did not really amount to misrepresentations and, even if they did, they were just not material to the issues that Officer Riley had to address under Regulation 4.

[88] As the Respondent points out, however, the Applicant was untruthful both on his application form and in his interview with Officer Riley concerning the names he uses and is known by, as well as his previous immigration history. And it did not stop at that. He then failed to produce documents he said he had in his possession and which were needed to substantiate things he had said at the interview. What he did produce raised further credibility issues so that, in the end, his general credibility was destroyed. The inconsistencies in the Applicant's account of his previous passport

and how it had been misplaced, and then stolen, and why he had decided to use a different name, and what happened to the police reports he said he had to corroborate events from 2002-2003, have still not been explained.

[89] It seems clear that, had the representations not been discovered, then a visa and record of landing could have been issued to the Applicant in a false, incomplete or inaccurate name and identity.

[90] The Applicant was sent a “fairness letter” which fully advised him that he might be found inadmissible on grounds of misrepresentation and which gave him 60 days to submit the documentation he said he possessed. The Applicant failed to respond. Hence, Officer Tieman’s eventual decision to find the Applicant inadmissible under subsection 40(1)(a) of the Act and his agreement with the findings and conclusions of Officer Riley.

[91] The Applicant now says that his inaccuracies and inconsistencies were not misrepresentations and, even if they were, they were not material; yet they remain unexplained. It seems to me that there is ample justification for the positions taken by Officer Riley and Officer Tieman. Their Decisions on misrepresentation were neither incorrect as a matter of law and were certainly not unreasonable given the evidence and the Applicant’s failure to resolve the concerns he had raised.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Application is dismissed.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-3943-08

STYLE OF CAUSE: ELISHA MUGU

APPLICANT

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

RESPONDENT

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: MARCH 25, 2009

REASONS FOR : HON. MR. JUSTICE RUSSELL

DATED: April 16, 2009

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