Federal Court  Cour fédérale

Date: 20100517

Docket: IMM-4463-09

Citation: 2010 FC 542

Ottawa, Ontario, May 17, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

PAULINO M. PAULINO

Applicant

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, dated August 13, 2009 (Decision), which dismissed the Applicant's appeal of a visa officer's decision to refuse sponsorship of the Applicant's spouse, Mimi Paulino.

BACKGROUND

[2] The Applicant married Mimi Paulino on September 8, 2006 in the Philippines. He then applied to sponsor her and her son as members of the family class. His application was refused after an interview at the Makati City visa section on May 16, 2007. The grounds for this refusal were that, pursuant to section 4 of the Act, the marriage was not genuine and was entered into primarily to acquire status or privilege. The IAD dismissed the appeal. The Applicant alleges that the IAD member was biased and erred in finding that his marriage was not *bona fide*.

DECISION UNDER REVIEW

[3] The IAD determined that two issues flowed from the visa officer's grounds for refusal: first, whether the Applicant's wife was a person described in section 4 of the Regulations and, as a result, could not be considered a member of the family class; and second, whether the Applicant is a Canadian citizen. Because the IAD found that the Applicant's marriage was not genuine and was entered into primarily to acquire status or privilege, the IAD declined to address the second point at issue.

[4] In making its determination, the IAD considered the oral evidence of the Applicant and his wife, as well as the record, the CAIPS notes, the documentary evidence, and the submissions of counsel.

[5] The IAD's Decision was based on its determination that the Applicant and his wife were "not credible and not reliable or trustworthy." It noted that they had fabricated information with the intent to obtain a temporary resident visa for the Applicant's wife and her son to enter Canada in 2006. The IAD held that "the degree of the couple's mendacity not only colours their entire testimony, but also impeaches their credibility." It found that their evidence was "internally and externally" inconsistent. Furthermore, the couple had deliberately "fabricated a complex scheme with the sole purpose to misrepresent the Applicant's financial status to excite (*sic*) a visa officer to grant her and her son temporary resident visas." The IAD also determined that the couple's

> intentional conduct was carried on throughout the temporary resident visa application process, continued throughout the sponsorship interview process and after the panel had heard substantial evidence at the appeal hearing. Their conduct engages public policy considerations, which strike at the heart of the integrity of the immigration system. As a result, the panel cannot accept their evidence to the extent that it is supported by other independent evidence.

[6] The IAD examined the couple's deception in detail, and found that the Applicant's wife had misrepresented that she had "$1,000,000,000 Pesos" in her bank account. On the first day of the hearing, the Applicant submitted that this money was the combined sum of what he had sent to his wife. It was not until cross-examination that the Applicant admitted he had lied about this scheme. His wife also stated that she "lied about everything" because her husband had instructed her to do so.

[7] The couple's scheme included the Applicant's making misrepresentations on his wife's application for a temporary resident visa. On her visa application, she claimed that she was going to visit relatives and intended to stay for three weeks. However, this alleged relative was the wife of the Applicant's ex-wife's brother, whom the Applicant's wife had never met.

[8] At her sponsorship interview in May, 2007, the Applicant's wife told the visa officer that she intended to visit a family friend. She also stated that she did not intend to visit the Applicant. The visa officer refused her claim.

[9] The evidence presented by the couple in the hearing before the IAD was inconsistent. The IAD noted that "sometimes, their evidence seems rehearsed and collusive," and that "during [the Applicant's wife's] testimony, at times, it seems [she] was reading or reciting her evidence or both." The IAD determined that "the couple's misrepresentation was not only fatal to their credibility and trustworthiness, but also calls into question the authenticity of the documents submitted by the couple, in particular those created overseas."

[10] The IAD found that the couple's conduct was "indicative of the extent to which they would go and what they are prepared to do to immigrate to Canada, including a marriage to allow the [Applicant's wife] to come to Canada and possibly, to allow the [Applicant] to sponsor his only living parent with a live-in caregiver."

[11] The IAD determined that a two-step evaluation of the facts was required: first, to determine whether the marriage was genuine; and second, to determine whether the relationship was entered into primarily for the purposes of acquiring status or privilege. The IAD noted that "to meet the onus…an appellant need only prove that one of the two prongs does not apply to their relationship."

[12] With regard to the initial decision made by the visa officer, the IAD found that "most of the visa officer's concerns are reasonable and tenable." The IAD accepted the visa officer's notes and gave them "considerable weight," since it had not been demonstrated that they were not reliable.

[13] The IAD then considered the testimony of the couple with regard to their relationship. It noted that the Applicant's wife stated that she and the Applicant were not "boy-friend-girlfriend" before the Applicant returned to Canada. However, when the wife was asked why she would accept his proposal if they were not, she then "changed her story to say they were."

[14] The couple presented much documentary evidence to the IAD, including many e-mails. The IAD noted that these e-mails were obviously "part of wood-shedding for the temporary resident visa process." The IAD noted that the couple said they had learned much about each other within the two weeks after they first met. However, the IAD found that "if that were the case, it is not clear to the panel why they needed to provide one another with their life stories."

[15] The couple's stories with regard to their first meeting, their introduction, and the introducer, up to the point of their purported engagement, was similar in detail.

[16] The IAD noted that the Applicant had testified that he decided to marry his wife after her temporary visa application was refused, although his initial plan included marrying her upon her arrival in Canada. The IAD found that the Applicant's explanation did not make sense, since he had proposed to his wife after a two-week courtship, but then claimed that he decided to marry her after she was denied a temporary resident visa. Furthermore, the Applicant was still situated in the U.S. at this time, and had presented "no cogent evidence about the substantive plans he had for the [wife's] accommodation had she been successful in her application for a temporary resident visa."

[17] The IAD did not accept the couple's evidence: "if they were so much in love and wished to be together soon, why not marry in March 2006?" Further, it noted that it did "not make sense that he would be head-over-heels in love with [her], arrange dishonest steps to get her to Canada on a temporary resident visa, and then [be] content to see her every fortnight indefinitely." It determined that the couple's actions belied their claims that they are in love and had engaged in a dishonest scheme because they love each other so much.

[18] Although the couple had introduced copious documents, including letters, photographs, money transfers, record of telephone calls and the like to support that their marriage is genuine, the IAD found that "the couple's demonstrated mendacity and untrustworthiness, their self-serving evidence, and contradiction inform the panel that little or no weight should be given to their evidence."

[19] The IAD also held that the incompatibility of the couple's age was a material issue, although not by itself determinative of the genuineness of the marriage. However, in conjunction with the mendacity of the couple, the IAD held that "the age factor is a distinction which makes a difference." Furthermore, the Applicant's wife had shown a strong desire to live in Canada. The IAD found that "indeed, age would not be a factor for her if [her] dominant desire was to live in Canada."

[20] The Applicant had also failed to provide "clear, convincing and cogent evidence" that he intended to reside in Canada, as required by the Act. Although his work visa in the U.S. expired in March of 2009, the IAD noted that "nothing precludes him, however, from continuing to search for job[s] in the USA," and that the Applicant had "provided no cogent substantive proof of his efforts to re-establish himself in Canada." The IAD was also not convinced with regard to the differing stories between the Applicant and his wife concerning the Applicant's divorce from his ex-wife.

[21] In summary, the IAD held that "based on the cogent evidence…the panel cannot accept the telephone records, the [Applicant's] subsequent visit, photographs, and letters as support of a genuine marriage. They are tools created to give a veneer of genuineness to the marriage." As such, "little or no weight [was] ascribed to them."

[22] The Applicant's wife was held to be a person within the meaning of section 4 of the Regulations and, accordingly, not a member of the family class.

ISSUES

[23] The issues raised by the Applicant can be characterized as follows:

1. Did the IAD rely on inappropriate criteria to discern the genuineness of the marriage and mistakenly find that the marriage was not *bona fide*?
2. Did the IAD breach the principles of procedural fairness by demonstrating a bias towards the Applicant?

STATUTORY PROVISIONS

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

Right to appeal — visa refusal of family class	**Droit d'appel : visa**
63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.	**63.** (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

[25] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 are also application in these proceedings:

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

shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.	considéré comme étant l'époux, le conjoint de fait, le partenaire conjugal ou l'enfant adoptif d'une personne si le mariage, la relation des conjoints de fait ou des partenaires conjugaux ou l'adoption n'est pas authentique et vise principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi.

STANDARD OF REVIEW

[26] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 held that a 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.

[27] The Applicant has raised procedural fairness before the Court, that is, whether the IAD demonstrated a reasonable apprehension of bias against him. Issues of procedural fairness are reviewable on a standard of correctness. See *Dunsmuir*, above, at paragraphs 126, 129.

[28] The Federal Court has previously determined that 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, [2006] F.C.J. No. 1375. However, a standard of

correctness is appropriate when determining whether a decision-maker relied on inappropriate criteria to make its determination as to the genuineness of a marriage. See *Ouk v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 891, [2007] F.C.J. No. 1157. As such, in determining whether the IAD relied on inappropriate factors in coming to its conclusion that the Applicant's marriage was not genuine, the appropriate standard of review is one of correctness.

ARGUMENTS

The Applicant

Marriage was *bona fide*

[29] An analysis of section 4 of the Regulations requires: first, an assessment of the genuineness of the marriage; and second, a determination of whether the marriage was entered into primarily for the purpose of acquiring status or privilege. However, the Applicant need only prove that one of these branches does not apply to his case. See *Khera v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 632, [2007] F.C.J. No. 886 at paragraph 6.

[30] In determining the genuineness of a marriage, the IAD ought to consider such factors as: (i) the length of the parties' prior relationship; (ii) their age difference; (iii) their former marital status; (iv) their respective financial situations and employment; (v) their family background; (vi) their knowledge of each other's histories; (vii) their language; (viii) their respective interests; (ix) family connections in Canada; and (x) prior attempts by the sponsoree to come to Canada: see *Khera*, above, at paragraph 10.

[31] It is clear, based on the IAD's reasons, that its primary concern with regard to the Applicant's credibility was the couple's admission of misrepresentation on the Applicant's wife's visitor visa application. The IAD determined that they were not credible because they "admit that they had fabricated information" on the visitor visa application. The IAD then considered their admitted misrepresentation for three pages of its Decision, and finally concluded that "the couple's misrepresentation is not only fatal to their credibility and trustworthiness, but also calls into question the authenticity of the documents submitted by the couple, in particular those created overseas."

[32] Although the IAD accused the Applicant and his wife of providing self-serving evidence and contradictions in testimony, the IAD made no specific reference to such things in its Decision to justify disregarding the couple's evidence. Rather, the Applicant suggests, the IAD simply punished the Applicant for the misrepresentation on the visitor visa application. Indeed, it appears that the IAD's decision with regard to the genuineness of the marriage is based on its determination of misrepresentation on the visitor visa application. This is an error of law.

[33] The IAD further erred by speculating about why the Applicant "might do such a thing." This speculation occurs repeatedly throughout the reasons, and highlights the fact that the Applicant was not afforded a fair hearing. Nowhere is this more evident than when the IAD stated during the hearing that "once a liar always a liar." The Applicant contends that this demonstrates that the IAD concluded that the Applicant's marriage was not genuine because he admitted to misrepresenting facts on the visitor visa application.

[34] The IAD failed to give any consideration to the compelling argument put forth by the Applicant that visitor visas are hard to secure and that, as a result, couples are often not truthful in their applications. The Applicant admitted knowing this behaviour was unacceptable, but explained that it had occurred because of the couple's love and desire to reunite. The IAD, however, failed to consider this explanation. The Applicant submits that this is striking, since the IAD's decision is based predominantly on this fact, and the explanation appears to be perfectly reasonable.

[35] In *Ouk*, above, which similarly considered a misrepresentation, the Federal Court held that

> 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.

[36] The Applicant submits that a similar error was made in the case at hand. When the IAD finally arrives at an assessment of the genuineness of marriage, it neglects to consider the relevant factors as enumerated in *Khera*. Rather, the Applicant contends, "[its] analysis is replete with speculation and abstract hypothetical scenarios."

[37] Specific problems in the IAD's reasons include:

a. The issue of "wood-shedding" between the Applicant and his wife;

b. The IAD's concern about why the Applicant did not marry his wife in March 2006 if they were so much in love;

c. The IAD's continuous reliance on "dishonest steps" take by the Applicant to get his wife into Canada;

d. The IAD's rejection of the Applicant's "copious" documentation because of the couple's "demonstrable mendacity";

e. The IAD's focus on the couple's age gap "in conjunction with the mendacity of the couple";

f. The IAD's lengthy and irrelevant assessment of the Applicant and his wife's differing accounts of the Applicant's first divorce;

g. The IAD's rejection of all the Applicant's documents because "they are tools to give a veneer of genuineness to the marriage."

[38] An examination of the reasons makes it clear that the IAD decided to punish the Applicant and his wife for the misrepresentation on the visitor visa application. Within the 15-page Decision, the IAD devotes only two paragraphs to the actual genuineness of the marriage. However, even this short assessment is premised on and permeated by the earlier misrepresentation issue.

[39] The IAD also makes a repeated factual error. While the Applicant's wife provided a bank letter which stated that she has 1 million pesos in her account, the IAD erred repeatedly in referring to the "1 billion pesos" the Applicant's wife claimed to have. The Applicant submits that this finding was "inaccurate and tends to over-exaggerate the extent of the misrepresentation in question."

[40] Furthermore, the IAD concluded that the Applicant's evidence was "internally and externally inconsistent," but failed to indicate what it considered to be inconsistent. One would

expect in such lengthy reasons that the panel would at least specify which inconsistencies led it to disregard all of the Applicant's "copious" evidence.

[41] In *Janjua v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1521, [2005] F.C.J. No. 1897 at paragraph 3, the Member determined that "my task is not to punish the applicant or appellant for having misled Canada immigration officials about any aspect of this case but to assess the bona fides of this marriage as prescribed by law." In the case at hand, the IAD punished the Applicant and his wife for misleading the immigration officials in her visitor's visa application rather than assessing the *bona fides* of the marriage. This error requires the Court's intervention.

Reasonable Apprehension of Bias

[42] The test for determining whether there is a reasonable apprehension of bias was set out in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, [1976] S.C.J. No. 118. The Supreme Court of Canada held that the

> apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information… [The] test is "what would an informed person. Viewing the matter realistically and practically – and having thought the matter through – conclude."

[43] In this instance, a reasonable person would conclude that the IAD demonstrated bias. A similar finding was made in *Janjua*, above, and ought to be made in the case at hand.

[44] Examples of bias can be seen in the IAD's reasons and also heard in the tapes of the proceeding and include the following:

a. The IAD's refusal to allow the Applicant's counsel to question him on redirect about his wife's knowledge of his children's occupations;

b. The IAD's aggressive attitude towards the Applicant, telling him at one point, after only once attempting to speak during his wife's testimony, "Mr. Paulino, I'm going to tell you for the last time. Don't speak. You sit there and keep your mouth shut."

c. After apologizing, the IAD stated "You had a long enough time to tell the applicant whatever you wanted to tell her. You don't do it here. You understand?"

d. The IAD's statement that "you gotta convince me that you lied before and you're not lying now, how do I know when you are not lying; you lied before and could be lying now…its very hard to undo a lie once you've been caught in the act of a lie";

e. The IAD's interruption of the Applicant's counsel to say "you know, there's an old saying, once a liar always a liar";

f. The IAD's statement that "I am not clairvoyant. I can't tell you; but I can tell you when I am done I can look at myself in the mirror forever and whether a Court upholds me or not I have absolutely not a jot or tittle of regret";

g. After referring to the Applicant's wife as Mrs. Paulino, then stating "I think that's what she's calling herself these days."

[45] The Applicant likens the case at hand to that of *Janjua*, above, in which the language used in the decision was found to amount to a demonstration of bias. In the case at hand, the Applicant was

not given a fair chance to present his case before an impartial decision-maker. It was clear throughout the hearing that the IAD had already made its determination with regard to the marriage and that it based its Decision almost exclusively on the Applicant's admitted misrepresentations. The Applicant alleges that not only was he denied procedural fairness, but that the IAD's zealousness and bias precipitated a substantive error, namely focussing on improper considerations. It is clear that the procedural breaches in this instance had a material impact on the outcome of the hearing and warrant judicial intervention.

The Respondent

[46] The IAD determined that the Applicant and his wife were not credible, reliable or trustworthy. This finding was based on numerous grounds:

a. The Applicant's admission of fabricating evidence for his wife's visitor visa application;
b. The degree of the couple's previous misrepresentation;
c. Contradictory evidence provided by the Applicant with regard to how much money his wife had in her bank account;
d. The fact that the Applicant's wife's evidence seemed rehearsed and collusive;
e. The e-mail exchange that occurred between the couple after the proposal which contradicted their evidence that they knew much about each other;
f. The inconsistency of the Applicant's evidence with regard to when he decided to marry his wife;

g. The fact that the IAD did not accept the Applicant's explanation for lying on the visitor visa application;

h. The lack of evidence with regard to a plan for his wife if she was granted a visitor's visa;

i. The age discrepancy between the Applicant and his wife.

[47] The Respondent contends that a review of the transcript reveals that the IAD showed no reasonable apprehension of bias, but rather was influenced by the dishonesty of the Applicant and his wife. The IAD gave the appropriate weight to the dishonesty of the couple, and then noted the other factors that convinced the IAD that the marriage was not genuine.

[48] Moreover, if the Applicant was concerned with bias, he should have raised the issue at the first available opportunity. The first available opportunity in this case would have been the hearing before the IAD. A failure to raise this issue at the earliest practical opportunity, or to object about a reasonable apprehension of bias, results in an implied waiver. As stated by the Federal Court of Appeal in *Re: Human Rights Tribunal and Atomic Energy of Canada Limited*, [1986] 1 F.C. 103 at 113, "the only reasonable course of conduct for a party reasonably apprehensive of bias would be to allege a violation of natural justice at the earliest practicable opportunity." In *Re: Human Rights Tribunal* at paragraph 13, the Court also noted that the applicant had "participated fully in the hearing, and must therefore be taken impliedly to have waived its right to object."

[49] The Respondent submits that the rationale for this principle of waiver is that "applicants cannot 'hold on' to an allegation of bias or 'refrain' from making an objection, to instead hoard it as insurance against future disappointments." In this case, the Applicant's counsel did not raise the issue of an allegation of bias. Accordingly, he has waived the right to raise it now.

[50] Regardless, based on a review of the transcript and the reasons as a whole, the Respondent contends that there is no evidence of improper conduct on the part of the IAD that would rise to the level of demonstrating a reasonable apprehension of bias.

[51] The IAD gave a number of reasons for its finding that the Applicant's marriage was not *bona fide*. The Applicant's arguments are nothing more than a disagreement about the weight the IAD assigned to the evidence before it. While the Applicant has asserted that the IAD should have found the marriage genuine based on the evidence before it, the IAD considered this evidence and then determined that it merited little weight.

ANALYSIS

[52] The Decision as a whole, together with certain comments made by the Officer, reveal that her assessment of the genuineness of the marriage and whether it was entered into primarily for the purpose of acquiring any status or privilege under the Act, was highly influenced by her discovery that the Applicant and Mimi had lied and fabricated evidence for Mimi's visitor's visa application:

> The panel finds that the Appellant and Applicant are not credible and not reliable or trustworthy. They admit that they had fabricated

> information with the intent to obtain temporary resident visas for the Applicant and her son to enter Canada in 2006. The degree of the couple's mendacity not only colours their entire testimony, but also impeaches their credibility. Their evidence was internally and externally inconsistent. The couple's conduct was deliberate. They fabricated a complex scheme with the sole purpose to misrepresent the Applicant's financial status to excite a visa officer to grant her and her son temporary resident visas. That intentional conduct was carried on throughout the temporary resident visa application process, continued throughout the sponsorship interview process and after the panel had heard substantial evidence at the appeal hearing. Their conduct engages public policy considerations, which strike at the heart of the integrity of the immigration system. As a result, the panel cannot accept their evidence to the extent that it is supported by other independent evidence.

[53] The same preoccupation is evident at paragraph 15 of the Decision:

> Some of the couple's evidence was internally and externally inconsistent. Sometimes, their evidence seems rehearsed and collusive. During her testimony, at times, it seems the Applicant was reading or reciting her evidence or both. The couple's misrepresentation in not only fatal to their credibility and trustworthiness, but also calls into question the authenticity of the documents submitted by the couple, in particular those created overseas.

[54] The Officer fails to explain at this point in the Decision what evidence she is referring to as being "internally and externally inconsistent" and what evidence seems "rehearsed and collusive" so that there is no clear basis for a negative decision outside of the preoccupation with the visitor's visa process. The Officer's attitude and approach, when the Decision is read as a whole, is that, because this couple lied once, nothing they now say about the genuineness of their marriage can be believed and that, indeed, the authenticity of the copious documentation that the couple produced on point is also fatally undermined.

[55] The Officer says that she adopts the factors referred to in *Khera*, *supra*, *Chavez*, *Rodrigo v. Canada (Minister of Citizenship and Immigration)*, IAD TA3-24409, February 11, 2005 and *Khan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 149m [2006] F.C.J. No. 1875 "where appropriate" but, in the end, everything that might favour the couple is discounted because of their earlier conduct over the visitor visa. Other anomalies and inconsistencies are raised, but without the gravitational pull of the visitor visa issue, they would not be a sufficient justification for discounting the Applicant's other evidence that clearly supports the genuineness of the marriage. This is particularly the case with the vast amount of documentary evidence which is so extensive that it is difficult to see how it could have been fabricated. The handling of the documentary evidence, in fact, is revealing of the Officer's whole approach in this instance:

> The Appellant adduces copious documents, including letters he purportedly sent and received in his job search and farewell card from his erstwhile colleagues at the bank as proof that he intends to reside in Canada. In addition, the couple adduces copious documents, including letters, photographs, money transfers, record of telephone calls and the like to support that their marriage is genuine. The couple's demonstrable mendacity and untrustworthiness, their self-serving evidence, and contradictions inform the panel that little or no weight should be given to their evidence. The panel finds in the context of this case, on the balance of probabilities, that the Appellant has not rebutted the visa officer's concern.

[56] The Officer refers to "self-serving evidence and contradictions," but it is not made clear, apart from their earlier mendacity of the visitor visa, what was contradictory or self-serving about their evidence that was of relevance to the issue before the Officer under section 4 of the Act.

[57] For example, in paragraph 32 of the Decision, the Officer refers to different information which the couple gave "about the cause of the dissolution of the Appellant's first marriage." The

Applicant has referred to a mental disorder and Mimi had referred to jealousy over the material possessions of neighbours and frequent arguments. There is nothing inherently incompatible about these explanations. Someone with a mental disorder can be jealous and initiate arguments. The Officer then goes on to speculate about the Applicant's relationship with his ex-wife and mentions that he has made provisions for Mimi's son. All of this is then subsumed by a general finding that whatever the couple says is all part of a general scheme of fabrication:

> There is evidence that he has made provisions even now for the Applicant's son. However, this is likely integral to the complex scheme the Appellant's (*sic*) has fabricated; if he is to be believed, the full extent of which was not known to the Applicant. The panel finds that the couple's shared knowledge, especially in the personal aspect of their lives, are not reflective of what one reasonably expects to be shared by a couple in a genuine relationship, who avers to be head-over-heel (*sic*) in love with one another.

[58] Based on the Officer's approach, it is clear that the couple cannot win. A detail (here the provision that the Applicant has made for Mimi's son) that might support the genuineness of the relationship is turned around to support a negative finding because it is likely integral to a complex scheme of fabrication. All of their supporting documentation, and even positive factors, are left out of account because they are, according to the Officer, part of a general scheme of fabrication. The Officer says that "their answer about their mutual feelings for one other and their plans are vague: nothing is specific." Yet there was considerable documentary evidence before the Officer, some of it pre-dating the visitor visa application, that spontaneously reveals the couple's mutual regard and love for each other. All of this evidence is discounted.

[59] In the end, the Decision's presiding premise is that, because of the admitted mendacity over the visitor's visa, the couple cannot be believed about anything. It may be acceptable in some circumstances for a general negative credibility finding to be used in this way but, tellingly in this case, the Officer fails to fully address the reasons offered by the couple for their conduct over the visitor visa. The Federal Court of Appeal found in *Sellan v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 381, [2008] F.C.J. No. 1685 at paragraph 3 that

> [w]here the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence.

In the present case the Officer has simply discounted the plethora of independent and credible documentary evidence capable of supporting a positive disposition on the grounds that it must all have been fabricated. However, there is no consideration of how such copious amounts of documentary evidence could possibly have been fabricated. The end result is that documentary evidence that supports the claim is simply disregarded.

[60] The Officer's focus on the visitor visa situation to the exclusion of just about everything else suggests a closed mind and has led to an unreasonable Decision. See, for example, *Abdel-Khalik v. Canada (Minister of Citizenship and Immigration)*, 73 F.T.R. 211, [1994] F.C.J. No. 111 at paragraph 15 (QL). She does not weigh the positive evidence against the negative. See *Cai v. Canada (Minister of Citizenship and Immigration)*, 131 F.T.R. 66, [1997] F.C.J. No. 690 at paragraph 20 (QL). She discounts it so that no real weighing occurs.

[61] In my view, when the Decision is read as a whole, the Officer is distracted from assessing the section 4 factors in accordance with the *Khera* criteria and focuses her Decision upon the earlier misrepresentations of the couple. This amounts to the selection of inappropriate criteria to discern the genuineness of the marriage and, in my view, is an error of law when reviewed on a standard of correctness. See *Ouk*, above, at paragraph 10.

[62] The Decision must be returned for reconsideration on this ground alone. There is no need for me to consider in detail the additional bias issue. The two issues, in fact, are part of the same problem. The Officer's decision that, because of the mendacity over the visitor's visa application, the copious evidence supporting the genuineness of the marriage is obviated and should be ignored. I think this approach evinces a reasonable apprehension of bias. See, for example, *Janjua*, above.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is granted and the Decision is quashed. The matter is returned for reconsideration by a different officer.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4463-09	
STYLE OF CAUSE:	PAULINO M. PAULINO	APPLICANT
	- and -	
	MCI	RESPONDENT
PLACE OF HEARING:	Toronto, Ontario	
DATE OF HEARING:	MARCH 30, 2010	
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL	
DATED:	MAY 17, 2010	

APPEARANCES:

Mario D. Bellissimo	APPLICANT
Bridget A. O'Leary	RESPONDENT

SOLICITORS OF RECORD:

Mario D. Bellissimo Barrister & Solicitor Toronto, Ontario	APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	RESPONDENT