Federal Court  Cour fédérale

Date: 20110719

Docket: IMM-5071-10

Citation: 2011 FC 900

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 19, 2011

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

GASTON VÉZINA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application to review the lawfulness of a decision dated July 21, 2010, by the Immigration Appeal Division of the Immigration and Refugee Board (the panel), dismissing the appeal brought by the applicant under subsection 63(1) of the of the *Immigration and Refugee*

Protection Act, S.C. 2001, c. 27 (the Act), against the decision not to issue a permanent residence visa to his spouse (the female applicant), a citizen of Cuba.

[2] A brief summary of the relevant facts is required to appreciate the nature of the applicant's appeal before the panel.

[3] The applicant is a Canadian citizen, born in Canada in 1937. He pled guilty in 2004 to sexual offences involving a minor; the acts in question go back more than 20 years and the victim is the niece of his former spouse. Having been sentenced to a prison term of two years less a day followed by two years of probation, the applicant was released on parole in 2005 and finished serving his sentence in December 2006; the two years' probation ended in December 2008.

[4] About a year before his conviction, the applicant, who often travelled to Cuba for his former employer, met the female applicant in February 2003. The female applicant, who was around 25 years old at the time, was married but was granted a divorce in September 2003. That being said, since February 2003, the applicant has made approximately 22 trips to Cuba and has given the female applicant approximately $20,000 to help her financially. The applicant and the female applicant, who had already entered into a "promesa" that they would see each other exclusively, were finally married in Cuba in December 2006.

[5] In the meantime, the female applicant applied for a visitor's visa in March 2004 to come to Canada, stating that the applicant was merely a friend. In July 2004, she filed a second application, in which she stated that she had been in a romantic relationship with the applicant since 2003. She

admitted that she had lied and was prevented from filing a new visa application for a period of two years. Two other visa applications were later filed by the female applicant in 2006 and 2008, but they were also refused by the visa officer.

[6] In May 2007, the applicant, then 70 years old and with no intention of settling in Cuba, made a first application to sponsor the female applicant. The application was refused on the basis that subparagraph 133(1)(*e*)(i) of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the Regulations), prevents a person who has been convicted of a criminal sexual offence from sponsoring another person.

[7] However, the applicant is always free to file a new sponsorship application on humanitarian considerations. This is what he decided to do in March 2009, but this second application was refused by the visa officer, this time because of the lack of humanitarian considerations. In September 2009, the applicant filed an appeal and submitted to the panel a file containing about 40 letters, e-mails and faxes that were sent between him and the female applicant and telephone bills listing long distance calls. He also testified at the hearing.

[8] The appeal was contested by the respondent, who initially thought that there were insufficient humanitarian considerations, and, in April 2010, the panel also agreed to add a second ground for refusal, namely that the marriage was not genuine and was entered into primarily for the purpose of acquiring a status in Canada. In July 2010, the panel dismissed the applicant's appeal, first because he failed to establish that, on a balance of probabilities, his relationship with the female applicant was not covered under section 4 of the Regulations, and second, because there were

insufficient humanitarian considerations to offset the ground for refusal under subparagraph 133(1)(*e*)(i) of the Regulations.

[9] Subsection 4(1) of the Regulations reads as follows:

4. (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership	4. (1) Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :
(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or	a) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;
(b) is not genuine.	b) n'est pas authentique.

[10] This application for judicial review is essentially based on the fact that the panel decided that the female applicant is excluded from the family class. The applicant alleges that the panel failed to rule on the genuineness of the marriage and that the panel's finding that the marriage was entered into primarily for the purpose of acquiring a status is also unreasonable. The respondent submits that the decision must be read as a whole, that the panel did not make a reviewable error and that the panel's findings are reasonable in all respects.

[11] It must be remembered that under section 4 of the Regulations, the panel must ascertain whether the marriage is genuine and whether it was entered into primarily for the purpose of

acquiring any status or privilege under the Act (*Mohamed v. Canada* (*Minister of Citizenship and Immigration*), 2006 FC 696 at para. 35). In this regard, the panel must consider the relationship in the present tense such that a relationship that may not have been "genuine" at the outset may have become genuine. Conversely, the panel's negative finding as to the genuineness of the marriage creates a presumption that the second branch of the test was met (*Sharma v. Canada* (*Minister of Citizenship and Immigration*), 2009 FC 1131 at para. 18; *Kaur v. Canada* (*Minister of Citizenship and Immigration*), 2010 FC 417 at paras. 15-17).

[12] Whether the issue is the genuineness of a marriage, the foreign national's true intentions or the existence of humanitarian considerations, the panel is in the best position to decide these matters. In short, the questions of fact and questions of mixed fact and law raised by the applicant in this case are reviewable on the standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47; *Bodine v. Canada* (*Minister of Citizenship and Immigration*), 2008 FC 848 at para. 17, and *Singh v. Canada* (*Minister of Citizenship and Immigration*), 2010 FC 378 at para. 12).

[13] For the following reasons, this application for judicial review must be dismissed.

[14] First, the panel did not fail to rule on the two branches of the test. Although the panel never uses the expression "non-genuine marriage" in its reasons for decision, the Court finds that the phrase "lack of good faith", used many times by the panel, goes to the genuineness of the marriage. Second, the panel's general finding seems reasonable in light of the evidence in the record and the applicable law, even though it may not be the only possible outcome.

[15] In a broad attack on the weight the panel gave to his testimony and the documents he filed in support of his appeal, the applicant disputes all the panel's unfavourable findings on the good faith of their relationship and the genuineness of the marriage, as well as on the true intentions of the female applicant.

[16] The applicant specifically criticized the panel for not having explicitly referred in its reasons to the applicant's passport, which shows the 22 visits he made to Cuba. The panel did note the financial support of $17,143 that he sent to the female applicant, but, according to the applicant, it did not give sufficient weight to this evidence. The same criticism applies to the panel's lack of consideration of the written correspondence between the applicant and the female applicant (except for the letter of December 30, 2007, which is mentioned), the telephone charges of around $2,000 for calls to Cuba and the 40 or so photos showing the partners together from 2003 to 2009.

[17] The applicant also claims that he never intended to live in Cuba; it was therefore normal that his wife should want to come to Canada. The applicant also claims that the panel erred in finding that marriage was proposed between the parties in 2003, two months after they met, but the "promesa" was made in 2004. The applicant argues that he clearly testified that there is a difference between the nature of a marriage proposal and a "promesa" in Spanish, which simply indicates an exclusive relationship.

[18] The applicant also argues that it was unreasonable for the panel to draw a negative conclusion from the female applicant's reaction to the applicant's crimes; the applicant pointed out that she was sad and had asked him for an explanation. Finally, the applicant admits that at the

hearing, he did tell the panel that he would let the female applicant go if his appeal was not allowed, but this merely showed that he was discouraged and that he did not intend to be a burden if they could not live together as a couple in Canada.

[19] In short, the applicant is today asking this Court to reassess all the evidence in the record and to substitute itself for the panel. This is simply not our role in assessing the lawfulness of the decision under review. The panel has sole jurisdiction over the facts and it is presumed to have examined all the evidence and the mere fact of not mentioning evidence in the reasons is not sufficient to set aside the panel's general finding and to refer the matter back for reconsideration (*Florea v. Canada* (*Minister of Employment and Immigration*), [1993] F.C.J. No. 598 (FCA)).

[20] While the panel seems to have erred in its reasons for decision by noting that the "promesa" had been entered into only a few weeks after the spouses had met (and not a year after), that error is not determinative in this case. Aside from the confusion over dates, the panel was entitled to include the "promesa" as part of a marriage proposal, since in the female applicant's application, signed on March 10, 2009, she stated herself that it was a marriage proposal. The fact remains that the marriage proposal was rushed and that even though the marriage did not take place before December 2006, it is simply because the applicant was in prison in 2004 and 2005.

[21] The onus was on the applicant to discharge his burden of proof under section 4 of the Regulations and to satisfy the panel that humanitarian considerations existed to offset the fact, among others, that the applicant is not eligible to be a sponsor under subparagraph 133(1)(*e*)(i) of the Regulations. The panel gave appropriate consideration to all of the applicant's testimony and

explanations and nevertheless rejected them by relying on the evidence in the record and by providing reasons for its decision, which is sufficient in this case.

[22] Finally, it also appears to the Court that the hearing was fair for the applicant. From the beginning of the hearing, the applicant was advised by the panel that the good faith of the marriage was at issue. If the applicant did not understand the importance of having the female applicant testify by telephone at the time, that was not the panel's error. The intentions that the panel attributed to the female applicant were determinative and the panel could reasonably find that the main purpose of the marriage was to acquire a status in Canada.

[23] For the above-noted reasons, this application for judicial review must fail. At the hearing, counsel agreed before the Court that no serious question of general importance arises in this case.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed; and

2. No question is certified.

"Luc Martineau"
Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-5071-10**
STYLE OF CAUSE:	**GASTON VÉZINA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	June 21, 2011
REASONS FOR JUDGMENT:	MARTINEAU J.
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