Federal Court  Cour fédérale

Date: 20111020

Docket: IMM-288-11

Citation: 2011 FC 1198

Ottawa, Ontario, October 20, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

RAUL ORLANDE QUEZADA BUSTAMANTE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of an Immigration Officer, dated January 10, 2011, refusing the applicant's application for permanent residence on the grounds that the applicant is not a member of the spouse or common-law partner in Canada class.

FACTS

Background

[2] The applicant, Raul Orlando Quezada Bustamante, is a citizen of Ecuador. He has been ordered to leave Canada on or before October 7, 2011.

[3] The applicant's sponsor, Ilda Do Couto, is a Canadian citizen.

[4] The applicant met his sponsor in Toronto in July 2004. He moved into the sponsor's house in September 2004. On October 13, 2006, the two were married at Toronto City Hall.

[5] The applicant and the sponsor have two children together: Alisha Selen Costa Quezada, born December 20, 2007, and Heyden Shania Costa Quezada, born May 4, 2010. They also had one pregnancy that ended in miscarriage.

[6] The applicant also had four children from previous relationships, none of whom live with him.

[7] The applicant made his application for permanent residence under the spouse or common-law partner in Canada class on March 5, 2007. He was interviewed, and on December 16, 2008, he was informed that he had been determined eligible for permanent residence under this class.

[8] On March 16, 2010, the applicant and the sponsor were called in for a second interview in Etobicoke, Ontario. Citizenship and Immigration Canada (CIC) informed the applicant that they received a 'tip' that he was having a relationship with another woman, and had had a child with this other woman. They showed the applicant photographs they had obtained of him with the woman, her child and her family.

[9] The applicant admitted to having an affair with this woman, and stated he was unsure whether he was the father of the child, but that it was likely. He admitted to spending time with her and with the child, but denied cohabiting with her. He stated that he had informed his sponsor of the affair and the child, and she eventually forgave him. The sponsor and the applicant stated that their marriage was genuine, despite the difficult time that they had dealing with the applicant's infidelity.

[10] After the interview, the sponsor submitted an affidavit, again stating that she was aware of the applicant's affair, but that she forgave him, and their relationship was stronger than ever.

Decision under review

[11] In a letter dated January 10, 2011, CIC informed the applicant that his application for permanent residence had been refused. The letter referred to Regulation 124(a), which requires that the applicant demonstrate he is "the spouse or common-law partner of a sponsor and that [he] cohabit[s] with that sponsor in Canada." The letter stated that a foreign national is not considered a spouse or common-law partner if the marriage or relationship is not genuine or was entered into primarily for the purpose of acquiring any status or privilege under the Act.

[12] The letter further stated:

> I am not satisfied that you have entered your marriage with your sponsor for genuine purposes, but primarily for immigration purposes. As such you do not meet the requirements of the class and your application for permanent residence as a member of the spouse and common-law partner in Canada class is refused.

[13] The applicant was also provided with a Decision and Rationale, which summarized the second interview of the applicant and sponsor that occurred on March 16, 2010, and the sponsor's affidavit. It then stated:

> Upon reviewing all the information on file and that provided by the applicant and sponsor at the interview, I am of the opinion that the couple are not in a genuine spousal relationship but for the purposes of immigration. I acknowledge that the sponsor and applicant are currently living together from the information provided at the interview to assess bonafides. However, given the intimate photographs with another woman other than his sponsor, the duration of his affair, the child he has with another woman, the time he continued to spend with his child and the mother of his child during his spousal application process, and the lack of substantial explanation as to why these events transpired, I am not satisfied that the applicant is in a genuine relationship with the sponsor. Although the applicant's explanation is possible for such events to have occurred, it is not probable in my opinion.

[14] The Decision and Rationale concluded that the applicant did not meet the requirements of Regulation 124(a), and that therefore the application was refused.

LEGISLATION

[15] Section 123 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) (the Regulations) creates the spouse or common-law partner in Canada class:

123. For the purposes of subsection 12(1) of the Act, the spouse or common-law partner in Canada class is hereby prescribed as a class of persons who may become permanent residents on the basis of the requirements of this Division.	123. Pour l'application du paragraphe 12(1) de la Loi, la catégorie des époux ou conjoints de fait au Canada est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents sur le fondement des exigences prévues à la présente section.

[16] Section 124 of the Regulations state the requirements for the spouse and common-law partner in Canada class:

124. A foreign national is a member of the spouse or common-law partner in Canada class if they	124. Fait partie de la catégorie des époux ou conjoints de fait au Canada l'étranger qui remplit les conditions suivantes :
(a) are the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada;	a) il est l'époux ou le conjoint de fait d'un répondant et vit avec ce répondant au Canada;
…	…

[17] Section 4 of the Regulations states that a foreign national will not be considered a spouse if the marriage was not genuine or was entered into primarily for the purpose of acquiring immigration status:

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.
. . .	. . .

ISSUES

[18] The issue before the Court is whether the decision of the Immigration Officer to refuse the application for permanent residence was unreasonable.

STANDARD OF REVIEW

[19] In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, per Justice Binnie at paragraph 53.

[20] The question of whether a marriage is genuine or entered into for immigration purposes is a question of fact, and is therefore to be reviewed on a standard of reasonableness: see, for example, my decisions in *Akinmayowa v Canada (Citizenship and Immigration)*, 2011 FC 171, at paragraph 18; *Yadav v Canada (Minister of Citizenship & Immigration)*, 2010 FC 140, at paragraph 50, and the other decisions cited therein.

[21] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, above, at paragraph 47; *Khosa*, above, at paragraph 59.

ANALYSIS

[22] The applicant submits that he was found eligible for permanent residence under the spouse or common-law partner in Canada class in 2008, and the subsequent change in circumstances was the discovery of the marital infidelity. Therefore, the infidelity was the decisive factor that led the Immigration Officer to refuse the application.

[23] The applicant submits that it is illogical to conclude that a marriage could have been entered into primarily for immigration purposes in 2006 because of an infidelity that occurred in 2008: the refusal letter, however, states that the Immigration Officer was "not satisfied that you have entered your marriage with your sponsor for genuine purposes, but primarily for immigration purposes."

[24] The applicant further submits that the justifications given for refusing the application were irrelevant to the decision. The applicant disputes the Officer's conclusion that the affair was of long duration, and submits that the fact that a child possibly resulted from the affair is immaterial.

[25] The applicant submits that the decision was based upon the moral judgment of the Officer, rather than an assessment of the genuineness of the applicant's marriage to the sponsor.

[26] Finally, the applicant submits that the decision did not give sufficient weight to the fact that the applicant and the sponsor have two children together. The applicant relies on the decision in *Gill v Canada (Minister of Citizenship and Immigration)*, 2010 FC 122, which states at paragraph 8 that the birth of a child must be attributed great weight: "Where there is no question about paternity, it

would not be unreasonable to apply an evidentiary presumption in favour of the genuineness of such a marriage." Thus, the failure of the Officer to consider this factor constitutes a reviewable error.

[27] The respondent submits that the Immigration Officer's conclusion falls within the range of possible, acceptable outcomes. The respondent submits that the Officer is entitled to rely on rationality and common sense in assessing credibility, and the Officer's conclusion that the marriage was not genuine was reasonable.

[28] The Court agrees with the applicant that marital infidelity in 2008 would not, as a matter of logic, support the conclusion that the marriage was entered into in 2006 primarily for immigration purposes. However, the Court attributes this illogic to poor wording in the refusal letter, and notes that the Decision and Rationale states that the applicant and sponsor "are not in a genuine spousal relationship but for the purposes of immigration." Thus, the Court interprets the Officer's conclusion to be that the marriage may have been genuine when it was entered into, but at the time of the decision the Officer was of the opinion that the marriage was no longer genuine, but existed for the purpose of the applicant acquiring status under the Act.

[29] The Court finds that the discovery of marital infidelity is relevant to the determination of whether the marriage between the applicant and sponsor is genuine. As stated in CIC's Operation Manual, *OP2: Processing Members of the Family Class* (the Manual), the Officer must determine whether a conjugal relationship exists between the spouses. The factors relevant to this determination include the existence of monogamy and a commitment to exclusivity.

[30] However, these are not the only relevant factors. The Manual describes a conjugal relationship as follows:

> **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 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, literally, the term means "joined together" or "yoked together."
>
> 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*. They include:
> • shared shelter (e.g., sleeping arrangements);
> • sexual and personal behaviour (e.g., fidelity, commitment, feelings towards each other);
> • services (e.g., conduct and habit with respect to the sharing of household chores)
> • social activities (e.g., their attitude and conduct as a couple in the community and with their
> families);

> • economic support (e.g., financial arrangements, ownership of property);
> • children (e.g., attitude and conduct concerning children)
> • 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;
> • regarded by others as a couple;
> • caring for children (if there are children).

[31] The Manual further sets out a detailed list of factors to be considered in assessing whether a conjugal relationship exists:

> **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 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. 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; • Joint ownership of property, other durable goods; • Operation of joint bank accounts, joint credit cards evidence that any such accounts have existed for a reasonable period of time; • The extent of any pooling of financial resources, especially in relation to

	major financial commitments; • Whether one party owes any legal obligation in respect of the other.
Social aspects of the relationship	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; • Joint membership in organisations or groups, joint participation in sporting, cultural, social or other activities; • Joint travel; • Shared values with respect to how a household should be managed; • Shared responsibility for children; shared values with respect to child-rearing; willingness to care for the partner's children; • 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.
Physical and emotional aspects of the relationship -the degree of commitment as evidenced by:	Knowledge of each other's personal circumstances, background and family situation; • Shared values and interests; • Expressed intention that the relationship will be long

term;
• The extent to which the parties have combined their affairs, for example, are they beneficiaries of one another's insurance plans, pensions, etc.?
• Joint decision-making with consequences for one partner affecting the other;
• 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;
• Time spent together;
• Time spent with one another's families;
• Regular and continuous communication when apart.

[32] The Manual notes that not all of the listed factors will be present to the same degree in all relationships, and not all factors are necessary for the relationship to be considered conjugal.

[33] The Officer found that, because of the applicant's relationship with another woman, the marriage was not genuine. The only countervailing factor mentioned by the Officer in her conclusion was the fact that the applicant and his sponsor were cohabiting. The Court finds that the applicant's relationship with another woman was a relevant consideration. However, there were numerous other factors supporting a conclusion that the marriage was genuine, beyond the cohabitation of the applicant and sponsor.

[34] In particular, the Officer was obliged to weigh the fact that the applicant and sponsor have two children together – one of whom was conceived and born after the applicant's infidelity. The Court agrees with the applicants that this factor deserves considerable weight, and the failure to explain why it was outweighed by other factors leads to the inference that the Officer did not weigh this factor in her decision.

[35] The Court also finds that the Officer's decision does not adequately disclose the rationale for the conclusion reached. The evidence relied on in her conclusion consisted of the photographs of the applicant and another woman, and the applicant's and sponsor's testimony. However, the applicant and sponsor also provided extensive testimony on the fact that their marriage was genuine, in spite of the applicant's infidelity. The Officer made no negative credibility findings, and does not explain why she accepts the applicant's testimony regarding the affair, but not his testimony regarding the genuineness of the marriage.

[36] Concluding that a marriage is not genuine has serious ramifications, and must not be undertaken lightly. This is all the more true when the couple in question has cohabited for over six years, has been married for over four years, and has two children together. In this case, the Court finds that the Officer's decision does not have the required transparency, intelligibility and justification to satisfy the standard of reasonableness.

[37] The Court notes that at the time the applicant made his application, a previous version of the Regulations was in force in which the test under section 4 was conjunctive rather than disjunctive.

The applicant has not submitted to the Court that the previous version of section 4 of the Regulations should apply. The question of whether the new version of section 4 applies retrospectively is an important one; however, since the Court has found that the decision must be set aside even if the new version of section 4 applies, the Court will leave this question to be determined when it is material to the application at issue.

CONCLUSION

[38] The Court finds that the Immigration Officer's decision to refuse the application for permanent residence was unreasonable. Therefore, the judicial review must be granted, and the matter referred back for a new interview and re-determination by a different Immigration Officer.

[39] No question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, and the matter referred back for a new interview and re-determination by a different Immigration Officer. No question is certified.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-288-11
STYLE OF CAUSE:	RAUL ORLANDE QUEZADA BUSTAMANTE v. THE MINISTER OF CITIZENSHIPAND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September, 28, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	Kelen J.
DATED:	October 20, 2011

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