Date: 20080715

Docket: IMM-5220-07

Citation: 2008 FC 870

Ottawa, Ontario, July 15, 2008

PRESENT: The Honourable Orville Frenette

BETWEEN:

IVANNA CHERTYUK

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), for judicial review of a decision by an immigration officer (Officer) on December 3, 2007, which refused the application of Ms. Chertyuk for permanent residence under the Spouse or Common-law Partner in Canada Class (Spousal Class). The Officer found that Ms. Chertyuk's marriage was not genuine on the basis that she had entered into it primarily for the purpose of acquiring status under the Act.

I. Facts

[2] The applicant, Ms. Chertyuk, is a citizen of Ukraine. She entered Canada as a visitor on September 15, 2004 and has remained here since that time.

[3] On November 6, 2004, Ms. Chertyuk met her current sponsor, Mr. Shishmanov, at a coffee shop. The two exchanged telephone numbers.

[4] A citizen of Bulgaria, Mr. Shishmanov had entered Canada on February 16, 2003 and made a successful claim for refugee protection. In the personal information form (PIF) filed in support of his claim for protection, Mr. Shishmanov stated that he feared persecution in Bulgaria on account of his homosexual orientation.

[5] Ms. Chertyuk says that she met Mr. Shishmanov for coffee a second time and they began to spend more time together. In January of 2005, Mr. Shishmanov confided in Ms. Chertyuk that he was homosexual.

[6] On February 14, 2005, Ms. Chertyuk says that she and Mr. Shishmanov were intimate for the first time.

[7] On March 1, 2005, Ms. Chertyuk's visitor visa expired.

[8] On March 11, 2005, Ms. Chertyuk was informed that her request for an extension of her visitor visa was refused. She was, however, given until May 1, 2005 to make arrangements to leave Canada.

[9] On April 2, 2005, Ms. Chertyuk says that Mr. Shishmanov made her a marriage proposal. She accepted.

[10] On May 1, 2005, Ms. Chertyuk's status in Canada ended.

[11] On May 31, 2005, Mr. Shishmanov was granted permanent residence.

[12] On July 30, 2005, Ms. Chertyuk and Mr. Shishmanov were married.

[13] On December 29, 2005, Ms. Chertyuk applied for permanent residence under the Spousal Class. Her application was sponsored by Mr. Shishmanov. Ms. Chertyuk and Mr. Shishmanov were interviewed individually by the Officer on November 26, 2007.

[14] On December 3, 2007, the Officer refused Ms. Chertyuk's application on the basis that her marriage to Mr. Shishmanov was not genuine. That decision is the subject of this application for judicial review.

II. Decision of the officer

[15] The Officer found that the marriage between Ms. Chertyuk and Mr. Shishmanov had been entered into for the sole purpose of acquiring permanent residence status under the Act for Ms. Chertyuk. Accordingly, the Officer refused Ms. Chertyuk's application under the Spousal Class. In support of her conclusion, the Officer noted that:

- in his PIF, Mr. Shishmanov stated that he first discovered "that [he] did not have an attraction towards women" when he was a teenager and that he feared persecution in Bulgaria on account of his homosexual orientation;
- in his interview, Mr. Shishmanov stated that the information contained in his PIF was correct, that he had sexual relationships with several men throughout his adult life, and that he was not bisexual;
- Ms. Chertyuk and Mr. Shishmanov did cohabit; and
- the timing of the alleged intimate encounter between Ms. Chertyuk and Mr. Shishmanov and the subsequent marriage proposal coincided with the refusal of Ms. Chertyuk's request for an extension of her visitor status.

The Officer was of the view that Mr. Shishmanov and Ms. Chertyuk were "living together as friends" and that he was "assisting her to acquire permanent residence in Canada." The Officer found to be incredible the evidence that Mr. Shishmanov changed his homosexual orientation after his encounter with Ms. Chertyuk.

III. Issues

[16] Ms. Chertyuk raises the following issues on judicial review:

(1) whether the Officer erred by applying the wrong legal test for a genuine marriage under Act;

(2) whether the Officer erred by failing to consider all of the evidence before her; and

(3) whether the decision of the Officer is unreasonable.

IV. Standard of review

[17] There are only two standards of review: reasonableness and correctness. See: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 34.

[18] The first issue raised in this application is one of law. The Court has previously taken the view that the correctness standard of review is applicable to such a question, see: *Mohamed v. Canada (MCI)*, 2006 FC 696, 296 F.T.R. 73 at para. 34. I can see no justifiable basis for departing from that view in this case. As the Supreme Court of Canada made clear in *Dunsmuir*, the correctness standard remains appropriate where a question of general law is raised. Given the impact of such an issue on the administration of the Act as a whole, a uniform and consistent answer is required. See: *Dunsmuir* at paragraphs 50, 60, and 122.

[19] The second issue under review – that the Officer ignored relevant evidence – engages the principles of procedural fairness. Such matters fall within the exclusive province of the Court and are reviewable on the standard of correctness. No deference is due. See: *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at para. 100. The Supreme Court of Canada in *Dunsmuir* confirmed that issues of fairness, which lie at the heart of the administration of justice, remain squarely within the supervising function of the Court. See: *Dunsmuir* at paras. 60 and 151.

[20] The third issue raised by Ms. Chertyuk is, in essence, a challenge to the Officer's conclusion that she entered into marriage with Mr. Shishmanov for the primary purpose of acquiring permanent residence status under the Act. Under the Spousal Class, the determination of whether a marriage is genuine has traditionally been reviewed on the reasonableness *simpliciter* standard. See e.g.: *Osazuma v. Canada (MCI)*, 2007 FC 1145, 69 Imm. L.R. (3d) 259 at para. 24. In the wake of the decision in *Dunsmuir*, the Court has accepted, albeit in a different context, that the reasonableness standard of review is now applicable to such findings. See: *Mustafa v. Canada (MCI)*, 2008 FC 564, [2008] F.C.J. No. 717 at para. 13 (QL).

[21] Review on the reasonableness standard requires the Court to inquire into the qualities that make a decision reasonable, which include both the process and the outcome. Reasonableness is concerned principally with the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within the range of acceptable outcomes that are defensible in fact and in law. See: *Dunsmuir* at paragraph 47.

V. Regulatory Framework

[22] Section 124 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations), provides that a foreign national is considered a member of the Spousal Class if he or she is the spouse of a sponsor and cohabits with the sponsor in Canada:

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; (b) have temporary resident status in Canada; and (c) are the subject of a sponsorship application.	a) il est l'époux ou le conjoint de fait d'un répondant et vit avec ce répondant au Canada; b) il détient le statut de résident temporaire au Canada; c) une demande de parrainage a été déposée à son égard.

[23] Section 4 of the Regulations provides that no foreign national is considered a spouse if his or her marriage is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act:

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

acquiring any status or privilege under the Act.	privilège aux termes de la Loi.

VII. Analysis

(A) Whether the Officer erred by applying the wrong legal test for a genuine marriage under Act.

[24] Ms. Chertyuk submits that the Officer erred by applying the wrong test for determining the genuineness of her marriage. Ms. Chertyuk says that she and Mr. Shishmanov fall within the parameters of section 124 of the Regulations. The Minister, on the other hand, submits that the Officer applied the proper test. According to the Minister, the reasons of the Officer demonstrate that she rightly "turned her mind to whether the marriage was genuine or whether it was entered into for immigration purposes." The respective positions of the parties on this point are considered below.

[25] Ms. Chertyuk argues that she meets the definition of spouse in subsection 124(a) of the Regulations. Ms. Chertyuk also contends that, in accordance with the decision in *Horbas v. Canada (MEI) and Secretary of State for External Affairs*, [1985] 2 F.C. 359, 22 D.L.R. (4th) 600 (T.D.), she did not enter the marriage "primarily for the purpose of gaining admission to Canada" because she had already entered Canada as a visitor and met Mr. Shishmanov by "happenstance." The Minister counters, arguing that sections 4 and 124 of the Regulations must be read together and that, contrary to the position of Ms. Chertyuk, the relevant question before the Officer was whether she entered the marriage "primarily for the purpose of acquiring any status or privilege under the Act." In my view, the argument of Ms. Chertyuk is not persuasive.

[26] As the Minister rightly observes, section 124 of the Regulations must be read together with section 4 of the Regulations. See: *Cao v. Canada (MCI)*, 2006 FC 1408, 58 Imm. L.R. (3d) 218 at paras. 8 and 24. Under section 124, a foreign national, such as Ms. Chertyuk, will be considered to be a member of the Spousal Class if she is the spouse of a sponsor and cohabits with that sponsor in Canada. In other words, section 124 defines the membership parameters of the Spousal Class. It does not, as Ms. Chertyuk suggests, define who is, or is not, a "spouse" for the purpose of the Regulations. That definition is found in section 4, which requires a foreign national to demonstrate that his or her marriage is genuine and not entered into primarily for the purpose of acquiring status under the Act. Accepting the interpretation proffered by Ms. Chertyuk would lead to the absurd result that every foreign national with a certificate of marriage and documentary proof of cohabitation would be a "spouse" within the meaning of the Spousal Class. This would ignore the clear intent and broad scope of section 4 of the Regulations.

[27] To the extent that Ms. Chertyuk argues that she has satisfied the test set forth in *Horbas*, having not married "primarily for the purpose of gaining admission to Canada" because she had already entered Canada as a visitor, it is important to note that *Horbas* was decided under subsection 4(3) of the former *Immigration Regulations, 1978*, SOR/78-172. That provision has since been replaced by section 4 of the Regulations, which now insists that a marriage not be entered into "primarily for the purpose of acquiring any status or privilege under the Act." That was the legal element Ms. Chertyuk was required to satisfy.

[28] Ms. Chertyuk also argues that the Officer erred by failing to refer expressly to section 4 of the Regulations and by implicitly introducing an irrelevant factor, namely that a genuine marriage must be one between two heterosexual persons. The Minister disagrees, arguing that the Officer introduced no such criterion and that her reasons were "clearly in line" with the Regulations. After reviewing the Officer's reasons as a whole, I am unable to agree with the interpretation adopted by Ms. Chertyuk.

[29] The failure of the Officer to refer expressly to section 4 of the Regulations does not give rise to a reviewable error. When the Officer's reasons are read as a whole, it is clear that she was guided by the proper legal considerations:

> [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.
>
> I am not satisfied that this marriage was not entered into 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, therefore, refused.

As to the suggestion by Ms. Chertyuk that the Officer improperly considered that a genuine marriage is strictly one between two heterosexual persons, the Officer's decision, reasons and notes reveal no such consideration – express or implied.

[30] Ms. Chertyuk further argues that the Officer fell into error by considering the timing of her relationship with Mr. Shishmanov in relation to her unsuccessful application to extend her visitor

visa. Timing is said to be irrelevant for the purpose of determining whether or not a marriage is genuine. Ms. Chertyuk also contends that the Officer failed to consider the decision in *Donkor v. Canada (MCI)*, 2006 FC 1089, 299 F.T.R. 262, which holds that a marriage originally entered into for the purpose of gaining status under the Act may later become genuine. The Minister adopts a contrary view, stating that it was open to the Officer to consider the circumstances surrounding Ms. Chertyuk's visitor visa. As to the effect of the decision in *Donkor*, the Minister argues that it is not applicable in this case given the Officer's "serious doubts about the relationship throughout." I do not find that the Officer fell into error as Ms. Chertyuk suggests.

[31] In determining whether a marriage is genuine, an officer is required to assess the credibility of an applicant and make findings of fact based on the record before him or her. As part of that analysis, an officer is required to consider all of the relevant evidence. It was not improper for the Officer to consider the timing of Ms. Chertyuk's relationship in light of her immigration history. This is not to say that timing is determinative of whether or not a marriage is genuine. Rather, it is to say that timing is but one factor that may be considered in assessing the genuineness of a marriage for the purpose of the Spousal Class. In this case, the negative decision of the Officer was grounded only in part on the timing of the relationship. While Ms. Chertyuk is right in pointing out that the decision in *Donkor* recognizes that a marriage originally entered into for the purpose of gaining status under the Act may later become genuine, that principle is not applicable in this case. It is clear that the Officer, even at the date of the decision, was not satisfied that Ms. Chertyuk and Mr. Shishmanov were in a genuine marital relationship:

> I am not satisfied that the applicant and her spouse/sponsor are in a bona fide marital relationship.

(B) Whether the Officer erred by failing to consider all of the evidence before her.

[32] Ms. Chertyuk also submits that the Officer erred by failing to consider all of the relevant evidence. Specifically, Ms. Chertyuk points to a medical insurance policy, which named her as beneficiary, a number of long distance telephone bills, which showed calls to her family in Ukraine and Mr. Shishmanov's family in Bulgaria, and numerous pictures, which depicted her and Mr. Shishmanov at the wedding, family gatherings and on vacation. The Minister, on the other hand, argues that the evidence relied upon by Ms. Chertyuk merely indicates that she and Mr. Shishmanov were cohabitating and does not speak to the issue of whether the marriage was entered into for the purpose of acquiring status under the Act. Put simply, the Minister takes the view that the Officer considered all of the evidence before her. Ms. Chertyuk has failed to persuade me that the Officer erred by ignoring relevant evidence.

[33] It is well-settled that an administrative decision-maker need not refer to every piece of evidence before it. Unless the contrary to shown, a decision-maker is presumed to have considered all of the evidence. See: *Florea v. Canada (MEI)*, [1993] F.C.J. No. 598 (C.A.) (QL). In this case, the Officer expressly noted the documentation filed by Ms. Chertyuk in support of her application for permanent residence, including credit card bills, an insurance policy, letters, a lease, a marriage certificate, and driver's licenses. In short, Ms. Chertyuk has failed to displace the presumption that the Officer considered all of the evidence.

(B) Whether the decision of the Officer is unreasonable.

[34] Ms. Chertyuk further submits that the Officer's decision to refuse her application for permanent residence is unreasonable. According to Ms. Chertyuk, the "sole basis" for the Officer's conclusion that her marriage was not genuine was Mr. Shishmanov's successful claim for refugee protection on the basis of his homosexuality. Ms. Chertyuk says that the Officer failed to consider the evidence that her relationship with Mr. Shishmanov developed over time and that Mr. Shishmanov no longer identifies as being homosexual. The Minister takes the opposite view, arguing that the decision of the Officer is reasonable and supported by the evidence of Mr. Shishmanov's stated sexual orientation and the timing of Ms. Chertyuk's status in Canada.

[35] Mr. Shishmanov's sexual orientation was not, as Ms. Chertyuk suggests, the sole basis for the Officer's decision. The Officer was also concerned that the relationship "coincide[d] with the timing when [Ms. Chertyuk] had been refused an extension of her visitor status in Canada." As to the claim that the Officer failed to consider the evidence that the relationship developed over time and that Mr. Shishmanov no longer identified as being homosexual, it is important to note that this evidence was in fact considered by the Officer and found to be incredible. The Officer did not believe that Mr. Shishmanov's sexual orientation would suddenly change after his encounter with Ms. Chertyuk. When that negative credibility finding is considered in light of Mr. Shishmanov's own evidence that he was involved in homosexual relationships throughout his adult life and not bisexual, it cannot be said that the Officer's decision is unsupported by the evidence or falls outside the range of acceptable outcomes that are defensible in fact and in law. While Ms. Chertyuk may disagree with the decision of the Officer, the decision cannot be said to be unreasonable.

[36] The parties did not propose any questions for certification, and I am satisfied that no serious question of general importance arises on this record. No question will be certified.

JUDGMENT

THE COURT ORDERS that this application for judicial review be dismissed. No question is certified.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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