Federal Court  Cour fédérale

Date: 20110321

Docket: IMM-4508-10

Citation: 2011 FC 341

Ottawa, Ontario, March 21, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ASAMENAW ABEBE

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*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Protection Board (the Board), dated July 12, 2010, wherein the Board denied the applicant's appeal from a refusal of his spouse's application for permanent residence as a member of the family class pursuant to section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

[2] The applicant requests an order setting aside the decision and remitting the matter back for redetermination by a differently constituted Board.

Background

[3] Asamenaw Abebe (the applicant) is an Ethiopian citizen who received Canadian permanent resident status on February 18, 1994 and became a Canadian citizen on February 23, 2003. He was born on July 27, 1952. The applicant's wife, Selamawit Asfaw Zegeye (the spouse) is an Ethiopian citizen who was living as a refugee in South Africa when she was introduced to the applicant. She was born on August 13, 1977. The applicant entered Canada in 1989 as a group sponsored refugee.

[4] On January 1, 2006, the applicant's cousin introduced him by telephone to the woman who is now his spouse. The spouse is a neighbour of the applicant's cousin, who lives in South Africa. The applicant and his spouse began regularly communicating by telephone. On November 26, 2006, the applicant traveled to South Africa to meet the spouse in person. They were married on November 28, 2006 and the applicant returned to Canada on November 30, 2006.

[5] The spouse applied for permanent residence as a member of the family class on February 1, 2007 and she was interviewed on October 9, 2007.

[6] By letter dated April 8, 2008, the spouse was informed that her application was refused because the officer had determined that the marriage was not genuine. This decision was based on: inconsistent evidence about when the applicant proposed; the age difference between the applicant

and his spouse; lack of proof of regular contact between the applicant and his spouse; the fact that the applicant did not send his spouse gifts or money; the spouse's lack of knowledge about the applicant's children; the fact that the spouse never talked about loving the applicant in the interview; and the lack of logical progression in their relationship.

[7] The applicant was also informed of the decision on April 8, 2008. He then commenced an appeal to the Board.

[8] The applicant returned to South Africa for four days in January 2009 to visit his spouse.

[9] The Board heard the applicant's appeal on June 21, 2010.

The Board's Decision

[10] The Board considered the applicant's testimony at the hearing and the additional documentary evidence, but concluded that the marriage was not genuine.

[11] The Board found that there were significant discrepancies between the information on the application, the applicant's testimony at the hearing and the spouse's testimony in her interview. Specifically, the Board found that there were discrepancies about when the applicant proposed. The Board also found that there was a lack of evolution in the relationship, particularly given how little time the applicant had spent with his spouse and given that the applicant did not exchange pictures with his spouse before proposing to her. The Board also found that the inconsistent evidence about

how many times the applicant has previously been married raised questions about the genuineness of the marriage, as did the spouse's lack of knowledge about the applicant's children.

[12] The Board considered the additional evidence of contact between the applicant and his spouse, but gave it little weight since it all occurred after the officer's decision was rendered. Further, the Board noted that phone bills provided were not in the applicant's name.

Issues

[13] The applicant characterizes the issue as:

Did the Board err in face, err in law, breach fairness or exceed jurisdiction in determining that the applicant's relationship to his wife is not genuine?

[14] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board misapprehend or ignore evidence in concluding that the marriage is not genuine?

Applicant's Written Submissions

[15] The applicant submits that the officer erred in assessing the *bona fides* of the marriage based on Western paradigms. The applicant submits that, when considered from an Ethiopian point of view, there are no reasons to believe that the marriage is not genuine. In particular, the applicant

submits that the age difference and the lack of proof of the “evolution of the relationship” are perfectly normal in Ethiopian culture and that the officer’s reliance on these issues to establish that the marriage is not genuine demonstrates an improper application of Canadian ideals to the facts of the application.

[16] The applicant further submits that the Board failed to consider the explanation offered for the discrepancy in when the applicant proposed. The applicant submits that he explained the error made by the officer, but that the Board failed to consider this explanation or disturb the officer’s erroneous finding. The applicant submits that the failure to explain why it rejected this explanation constitutes a reviewable error.

[17] The applicant also argues that the Board failed to address his explanations for why the marriage happened so soon after he arrived in South Africa and why he and his spouse did not spend more time together when he was in South Africa.

[18] The applicant submits that the Board erred when it found a discrepancy regarding the number of times that he has been married. The applicant further submits that the Board failed to consider the explanations for why his wife did not know the ages of his children. Finally, the applicant submits that the Board failed to consider evidence that he uses the phone number even if it is not in his name and that he had sent his spouse money.

Respondent's Written Submissions

[19] The respondent submits that the Court should not intervene with the Board's credibility assessment because the Board had the benefit of hearing the applicant's testimony. The respondent further submits that the Court should not interfere with the Board's conclusions unless they are unreasonable and based on irrelevant considerations or disregard evidence.

[20] The respondent submits that the issue of whether the marriage is genuine is a factual one and is reviewable on the standard of patent unreasonableness.

[21] The respondent submits that the evidence regarding the date of the applicant's proposal to his spouse is inconsistent and that the Board's conclusion was therefore reasonable.

[22] The respondent also submits that the relationship lacked evolution.

[23] The respondent submits that the Board considered the explanation for why the marriage occurred so soon after the applicant arrived in South Africa and that the Board reasonably rejected it.

[24] The respondent submits that it was reasonable for the Board to find that evidence of communication from January 2006 until the date of the wedding in November 2006 would support the genuineness of the marriage. The respondent argues that the Board reasonably concluded that there was no evidence of such communications.

[25] The respondent submits that the spouse lacked knowledge about the applicant. The respondent submits that the spouse gave incorrect information about how many times the applicant has previously been married and that the spouse did not know the ages of the applicant's children. The respondent suggests that this lack of knowledge supports the Board's conclusion that the marriage is not genuine.

[26] The respondent further submits that the evidence provided at the appeal hearing does not demonstrate the ongoing genuineness of the marriage.

[27] The respondent submits that the Board's conclusion that the marriage is not genuine is reasonable based on the evidence in the record.

Applicant's Reply

[28] The applicant submits that the respondent has failed to address his arguments, but rather has simply repeated the Board's findings and asserted that they are reasonable.

[29] Specifically, the applicant submits that the respondent has failed to respond to the issue of whether the officer and the Board improperly assessed the genuineness of the marriage on a Western paradigm. Specifically, the applicant argues that the concerns about the lack of logical progression of the relationship and the age difference between the applicant and his spouse, as well as the spouse's failure to express her love for her husband, reflects an improper application of

Western ideals to the question of whether the marriage is genuine. The applicant states that the respondent has failed to address this argument at all.

[30] The applicant also argues that the respondent has failed to address the explanations offered for the inconsistencies regarding when the applicant proposed and how many times he has previously been married.

Analysis and Decision

[31] **Issue 1**

What is the appropriate standard of review?

The issue of whether a marriage is genuine is one of mixed fact and law, which attracts deference. This Court has held that decisions as to the genuineness of a marriage are reviewable on the standard of reasonableness (see *Provost v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1310, 360 FTR 287 at paragraph 23).

[32] **Issue 2**

Did the Board misapprehend or ignore evidence in concluding that the marriage is not genuine?

The respondent has failed to address the applicant's argument that the Board improperly assessed the genuineness of the marriage against Canadian paradigms. The applicant relies on *Bains v. Candaa (Minister of Employment and Immigration)* (1993), 63 FTR 312, [1993] FCJ No 497 (QL), in which this Court set aside a negative refugee decision that was based on implausibility

findings. In that decision, the applicant had argued that “Canadian paradigms do not apply in India” (at paragraph 5) and the present applicant now argues that, similarly, Canadian paradigms do not apply in Ethiopia.

[33] This Court has held that “The ‘genuineness’ of the relationship must be examined through the eyes of the parties themselves against the cultural background in which they have lived” (see *Farid Khan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1490, 59 Imm LR (3d) 261 at paragraph 16). Further, although in the context of a refugee decision, this Court has held in *Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, 208 FTR 267 at paragraph 9 that:

> A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu.

[34] Similarly, this Court recently held in *Gill v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 122, 362 FTR 281 at paragraph 7 that:

> When assessing the genuineness of an arranged marriage, the Board must be careful not to apply expectations that are more in keeping with a western marriage. By its very nature, an arranged marriage, when viewed through a North American cultural lens, will appear non-genuine.

[35] The applicant submits that several of the Board’s concerns about the genuineness of the marriage arise from its improper application of Canadian paradigms. In particular, the applicant argues that the age difference between him and his spouse is not unusual in Ethiopian culture and

that it is unusual in their culture to discuss romantic love with strangers. The applicant further argues that his culture explains the lack of logical progression in the relationship and his spouse's lack of knowledge about his children.

[36] The Board makes no mention of the applicant's suggestion that his culture offers an explanation for these concerns. Further, the respondent has failed to address this argument in its submissions. The Board did not find that the applicant's testimony was not credible. In the absence of evidence to contradict the applicant's sworn testimony on this issue, it was unreasonable for the Board not to consider whether cultural differences answers its concerns about the genuineness of the marriage.

[37] The applicant has also submitted that the Board erred in finding that he and his spouse had given inconsistent evidence about when he proposed. The applicant's evidence was consistent: he claims that they were introduced on January 1, 2006 and that he proposed in March of the same year. The spouse's evidence in her interview was also consistent: she claimed that they were introduced on January 1, 2006 because they were both single and the applicant was looking for a wife and that she decided to marry him nine months later. The officer asked the spouse why she had put January 1, 2006 as the date of the proposal on her application and she explained that the reason why the applicant's cousin introduced them was because he knew that the applicant wanted to get married again, so they both knew that the purpose of the introduction was to see if they wanted to marry each other. The spouse explained that the applicant had brought up marriage during their first conversation, but never said in the interview that the applicant proposed on January 1, 2006.

[38] Similarly, the applicant has submitted that the Board erred in finding that, if his marriage was genuine, it was unreasonable for the spouse not to know how many times the applicant had previously been married. The applicant explained the discrepancy at the hearing and his explanation was not challenged. The Board found that it was unreasonable that the spouse would not offer the same explanation as the applicant about the inaccurate information. However, the applicant has explained that his spouse felt intimidated by the officer and both the Board and the respondent have failed to address this explanation.

[39] The respondent's submissions are unresponsive to the arguments of the applicant. In the absence of any submissions to the contrary, the applicant has raised valid arguments that justify this Court's intervention.

[40] Accordingly, the application for judicial review should be allowed.

[41] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[42] **IT IS ORDERED that** the application for judicial review is allowed, the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, S.C. 2001, c. 27

72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

Immigration and Refugee Protection Regulations, SOR/2002-227

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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4508-10
STYLE OF CAUSE:	ASAMENAW ABEBE - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 8, 2011
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	March 21, 2011

APPEARANCES:

Micheal Crane	FOR THE APPLICANT
Veronica Cham	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Micheal Crane Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT