

Federal Court



Cour fédérale

Date: 20110418

Docket: IMM-2432-10

Citation: 2011 FC 472

Toronto, Ontario, April 18, 2011

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Applicant

and

YVES FABIEN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Mr. Yves Fabien, a Canadian citizen, sought to sponsor his spouse, Ms. Feta Delima, to become a permanent resident of Canada. The couple married in Haiti in December 2006, having met a few months earlier. A visa officer rejected Mr. Fabien's application on the ground that the marriage was not genuine. Mr. Fabien appealed that decision to the Immigration Appeal Division

(IAD) and succeeded.

[2] The Minister now seeks to overturn the IAD's decision on the basis that it was arrived at unfairly, and was unreasonable. The Minister submits that the IAD erred by refusing to allow counsel to call Ms. Delima as a witness, and by failing to take account of the evidence that the visa officer relied on in concluding that the marriage was not genuine.

[3] I cannot conclude that the IAD acted unfairly. Counsel for the Minister simply failed to pursue his wish to question Ms. Delima at the hearing. However, I agree that the IAD's decision was unreasonable in light of the vague and contradictory evidence before it relating to the marriage. I must, therefore, allow this application for judicial review.

[4] The issues are:

1. Did the IAD act unfairly?
2. Was the IAD's decision unreasonable?

II. The Visa Officer's Decision

[5] The visa officer found a number of circumstances that appeared inconsistent with a genuine marriage between Mr. Fabien and Ms. Delima:

- little ongoing communication between them;

- little knowledge on Ms. Delima's part about Mr. Fabien's life – his job, salary, social activities, financial arrangements, previous marriages, other family members, *etc.*;
- contradictory descriptions of the wedding reception and accounts of subsequent visits by Mr. Fabien to Haiti;
- the documentary evidence (letters and cards exchanged between them) appeared to have been contrived to support the application.

[6] Based on this evidence, the visa officer concluded that the marriage was not genuine.

III. The IAD's Decision

[7] The IAD set out some of the factors to be considered in deciding whether a couple's marriage is genuine:

- the circumstances surrounding their meeting and the evolution of the relationship;
- the circumstances of their engagement and marriage;
- their behaviour before and after the wedding, including communication between them;
- the involvement of the respective families in the engagement and marriage; and
- their future plans.

[8] The IAD found Mr. Fabien's testimony to be forthright and credible. Mr. Fabien had recounted the circumstances when he first met Ms. Delima. They fell in love at first sight; she then moved in with him. She lived in the house owned in Haiti until the earthquake in January 2010.

[9] The IAD accepted Mr. Fabien's assertion that he had spent \$3000 on the wedding, which was followed by a reception attended by 45 people. It also found that Mr. Fabien regularly sent money to Ms. Fabien and the couple communicated frequently by telephone.

[10] The IAD was satisfied that Mr. Fabien had resolved the contradictions noted by the visa officer and was aware of numerous details about his wife's life in Haiti. It was persuaded that the marriage was genuine and allowed Mr. Fabien's appeal.

(1) Did the IAD Act Unfairly?

[11] At the hearing before the IAD, counsel for the Minister expressed his intention to call Ms. Delima to testify by telephone. He asked Mr. Fabien if his spouse was prepared to testify to explain the answers she had given to the visa officer. Mr. Fabien said that she was ready and willing.

[12] Counsel went on to cross-examine Mr. Fabien. Nothing more was said about the question of Ms. Delima's testimony. At the end of his cross-examination, counsel simply said he had no further questions and thanked the presiding member.

[13] I can see no basis for the Minister's argument that the IAD refused to allow counsel to call Ms. Delima. Counsel seemed to have abandoned the idea. He made no objection to the IAD's conduct of the hearing at the time.

(2) Was the IAD's Decision Reasonable?

[14] Mr. Fabien obviously impressed the IAD with his candour and sincerity. The IAD concluded from his testimony that the gaps and contradictions noted by the visa officer had been filled in and resolved.

[15] However, on a review of the transcript of the hearing before the IAD, I cannot find a basis for the IAD's conclusion.

[16] Mr. Fabien described the frequency of his telephone conversations with Ms. Delima but, when asked, could say little or nothing about their content. I see no basis for the IAD's finding that Mr. Fabien was familiar with many details about his wife's life in Haiti. Further, the other gaps in the couple's knowledge noted by the visa officer remained.

[17] With respect to contradictions, these, too, persisted before the IAD. For example, before the visa officer, Ms. Delima had stated that they had not had a wedding reception. Mr. Fabien told the IAD that he had spent \$3,000 on a reception for 45 people. Ms. Delima told the visa officer that Mr. Fabien's last visit to Haiti was in August 2007. Mr. Fabien testified before the IAD that he visited

Haiti often, including in August 2008. Again, I cannot see a basis for the IAD's conclusion that Mr. Fabien's testimony had cleared up these discrepancies.

[18] Overall, I find that the IAD's decision was unreasonable; it was not a possible, defensible outcome based on the law and the facts.

IV. Conclusion and Disposition

[19] I cannot find a basis for the Minister's suggestion that the IAD acted unfairly. However, based on the evidence before it, I must find that its conclusion - that Mr. Fabien had provided adequate and persuasive testimony that resolved the concerns noted by the visa officer - was unreasonable. Therefore, I must allow this application for judicial review and order a new hearing before a different panel of the IAD. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is referred back to the Board for a new hearing before a different panel;
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2432-10

STYLE OF CAUSE: MINISTER OF PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS
v
YVES FABIEN

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: January 26, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: April 18, 2011

APPEARANCES:

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(ON HIS OWN BEHALF)

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