Federal Court  Cour fédérale

Date: 20111216

Docket: IMM-801-11

Citation: 2011 FC 1481

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, December 16, 2011

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

LESLY JOSEPH

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by the Minister of Citizenship and Immigration (applicant) under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of the decision by the Appeal Division of the Immigration and Refugee Board (the panel) dated January 21, 2011. In that decision, the panel allowed the respondent's appeal of the refusal of his wife's application for permanent residence as a member of the family class under section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations).

[2] The applicant is asking the Court to make an order setting aside the panel's decision under paragraphs 18.1(4)(*c*) and 18.1(4)(*d*) of the *Federal Courts Act*, RSC 1985, c F-7. He alleges that the panel erred in fact and in law.

I. Background

A. Facts

[3] Lesly Joseph (respondent) is originally from Haiti. He has been a permanent resident in Canada since October 19, 1998.

[4] The applicant's wife, Marie-Michelle Annilus (respondent's wife) is a citizen of Haiti. She claims that she was born on December 11, 1976, approximately six years before the respondent was born.

[5] The respondent and his wife have known each other since childhood. After learning that she was newly single, the respondent called her on December 24, 2000. After a number of telephone conversations, the respondent eventually proposed to her on December 11, 2001, and they were married on June 21, 2002.

[6] On June 28, 2006, the respondent filed an application to sponsor his wife.

[7] On August 22, 2007, the respondent's wife had an interview with an immigration officer at the Canadian Embassy in Port-au-Prince, Haiti.

[8] In a letter dated November 26, 2007, the immigration officer rejected the application of the respondent's wife for permanent residence on two grounds: her identity and the genuineness of the marriage.

[9] Concerning the identity of the respondent's wife, the officer questioned the fact that she had introduced into evidence a late declaration of birth issued in 1983 and the fact that she had no reliable secondary documents to support the late declaration.

[10] The immigration officer also stated that, since identity had not been established, she had doubts about the genuineness of the marriage. She determined that the marriage between the respondent and his wife had been entered into primarily for the purpose of acquiring permanent residence. The officer reached that conclusion after considering how the respondent and his wife met, their ongoing relationship after their marriage, her lack of knowledge about her husband, and the type of documents filed. Consequently, the immigration officer determined that her account was not credible.

[11] In a letter dated May 22, 2008, the immigration officer refused the application and concluded that the respondent's wife was a person referred to in section 4 of the Regulations.

[12] On February 5, 2008, the respondent appealed that decision to the panel under subsection 63(1) of the Act.

[13] The hearing before the panel took place in two parts.

[14] The panel's first session dealt with the identity of the respondent's wife—the immigration officer's first ground for refusal. The panel issued an interlocutory decision on February 5, 2010, which stated that the immigration officer had erred by concluding that the identity of the respondent's wife had not been established.

[15] The second session addressed the issue of the genuineness of the marriage between the respondent and his wife (the second ground for refusal). That decision, issued on January 21, 2011, allowed the appeal and concluded that the marriage was genuine and *bona fide*.

[16] On this judicial review, the interlocutory decision issued on February 5, 2010, is the only decision that the applicant is disputing.

B. Impugned decision

[17] The panel determined that the late declaration of birth of the respondent's wife was a reliable document even though it did not fully comply with the limitation period. The panel found that the immigration officer had not indicated that the late declaration of birth was a false document, that the document was not issued in accordance with Haitian law or that the document was issued improperly, either on the basis of false statements or by other means that do not comply with the Act. The panel stated that the immigration officer had not given adequate reasons for rejecting the document and that she had not considered the explanations provided by the respondent's wife.

[18] In addition, the panel found that the immigration officer failed to address the validity of the passport and national identity card of the respondent's wife although they had been filed. Relying

on *Oumer v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1353, [2003] FCJ No 1739, *Andryanov v Canada (Minister of Citizenship and Immigration)*, 2007 FC 186, [2007] FCJ No 272, *Mijatovic v Canada (Minister of Citizenship and Immigration)*, 2006 FC 685, [2006] FCJ No 860, and *Ogunmefun v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1302, 188 FTR 317, the panel stated that the passport was a document that had been validly issued by the Haitian authorities.

[19] The panel also briefly considered the secondary documents filed in evidence to establish the identity of the respondent's wife. The panel explained that the irregularities in the documents related to her presentation at the temple were caused by the [TRANSLATION] "context and the particular situation in the country in question . . . and that the registers are sometimes destroyed, lost or are not always properly maintained" (Panel's Decision, p 7). Also, with respect to the school documents of the respondent's wife and the fact that some of them spell her last name differently, the panel accepted her explanation that these errors were, in fact, attributable to the director of the École Sainte-Catherine.

[20] Consequently, the panel found that the passport and national identity card of the respondent's wife were reliable documents and that the testimony was credible. The panel therefore stated that the respondent had discharged his burden of proving his wife's identity on a balance of probabilities.

II. Issues

[21] The parties raised a number of issues. In the Court's view, the pertinent issue in this case is the following:

> *Did the panel err in fact and in law in its assessment of*
> *(a) the late declaration of birth;*
> *(b) the passport of the respondent's wife; and*
> *(c) the secondary documents?*

III. Applicable statutory provisions

[22] Section 12 of the *Immigration and Refugee Protection Act* provides as follows:

Selection of Permanent Residents	*Sélection des résidents permanents*
Family reunification	Regroupement familial
12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident. . . .	**12.** (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement. […]

[23] Section 4 of the *Immigration and Refugee Protection Regulations* states the following:

Family Relationships	Notion de famille
Bad faith	Mauvaise foi
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,	**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

common-law partnership or conjugal partnership (*a*) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or (*b*) is not genuine. . . .	d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas: *a*) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi; *b*) n'est pas authentique. […]

IV. Standard of review

[24] The Court points out that in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the Supreme Court stated at paragraph 51 that ". . . questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness." Thus, the Court agrees with the parties, and the reasonableness standard applies in this case.

V. Analysis

[25] Two introductory comments are appropriate before the Court can deal with the issues and evidence that the parties are disputing.

[26] First, it should be noted that the parties agree on the fact that, under the exhaustion doctrine, the applicant only filed an application for judicial review of the panel's interlocutory decision of February 5, 2010, after the final decision of January 21, 2011, because there were no exceptional circumstances justifying a review of the interlocutory decision prior to the final decision (see *C.B. Powell Ltd. v Canada (Border Services Agency)*, 2010 FCA 61, 400 NR 367; *Greater Moncton*

International Airport Authority v Public Service Alliance of Canada, 2008 FCA 68, [2008] FCJ No 312). The respondent does not dispute this fact.

[27] The Court also believes it is appropriate to point out that appeals before the panel are *de novo* hearings. In *Mendoza v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 934, [2007] FCJ No 1204, my colleague, Mr. Justice de Montigny, wrote the following:

> [20] I need only add to this that the *Kahlon* decision has been followed repeatedly by this Court after the adoption of the *IRPA*, and it is often noted in these cases that the *de novo* jurisdiction issue is accepted and not a point of contention between the parties: see, for example, *Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1673, at paragraph 8; *Ni v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 241, at paragraph 9; *Canada (Minister of Citizenship and Immigration) v. Savard*, 2006 FC 109, at paragraph 16; *Canada (Minister of Citizenship and Immigration) v. Venegas*, 2006 FC 929, at paragraph 18; *Froment v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1002, at paragraph 19.

At this stage, the Court will address the issue of the late declaration of birth of the respondent's wife.

(a) Late declaration of birth of respondent's wife

[28] The applicant states that even if the late declaration of birth is a legal document, this type of document is often issued fraudulently. The applicant says that the late declaration of birth cannot be used to confirm her identity because it was issued in 1983, seven years after she was born. The applicant also submits that her explanation is contradictory. She says that when she was to be enrolled in school, her parents noticed that they had mislaid her birth certificate. Accordingly, they had to obtain this late declaration. However, the applicant points out that the evidence shows that the respondent's wife was enrolled in school in 1982, a year before the late declaration was obtained. Although this contradiction was raised at the hearing before the panel, the applicant notes

that the panel disregarded this irregularity and simply stated that [TRANSLATION] “when the late declaration of birth was obtained, on June 25, 1983, she was six years old. The panel does not doubt her testimony that she needed it for school” (Panel’s Decision, paragraph 10).

[29] In addition, the applicant maintains that in considering the late declaration issue the panel should have followed its own previous decisions (*Durandisse v Canada* (*Minister of Citizenship and Immigration*), [2008] IADD No 1594, 2008 CanLII 75911 (IRB) [*Durandisse*]; *Joseph v Canada* (*Minister of Citizenship and Immigration*), [2007] IADD No 527, 2007 CanLII 52912 (IRB) [*Joseph*]; *Lubintus v Canada* (*Minister of Citizenship and Immigration*), [2010] IADD No 22, 2010 CanLII 38258 (IRB) [*Lubintus*] and those of the Federal Court (*Julien v Canada (Minister of Citizenship and Immigration*), 2010 FC 351, [2010] FCJ No 403 [Julien].

[30] Essentially for the applicant, these decisions state that late declarations of birth from Haiti are not reliable identity documents. Although the applicant argued the *Durandisse* case before the panel, he criticizes the panel for disregarding it. Consequently, the applicant contends that the failure to consider previous IAD decisions is a reviewable error.

[31] For his part, the respondent takes the position that the panel stated that the applicant had not provided evidence that the late declaration of birth was a false document, had not been issued in accordance with Haitian law or had been issued improperly. The Court notes that counsel for the respondent submitted at the hearing that the late declaration of birth was obtained a year after his wife started school because a birth certificate is required only for primary school not kindergarten.

The respondent also alleges that his wife's late declaration of birth is not an excerpt from the archives but a birth certificate with a judgment from the St. Marc civil court dated June 23, 1983.

[32] Also, the respondent submits that the *Julien* and *Joseph* cases do not apply because, he says, they differ from this case (Respondent's Memorandum, paragraph 19).

[33] First, the Court observes that the panel's decision did not analyze the irregularity raised by the applicant concerning the issuance of the late declaration of birth. On this point, the panel's reasons at paragraph 10 of the decision are inadequate because they say nothing about the irregularity in the evidence that the applicant raised. Pursuant to *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration*) (1998), 157 FTR 35 [*Cepeda-Gutierrez*], the onus is on the panel to explain why it accepted the explanation of the respondent's wife regarding the one-year discrepancy between when the late declaration of birth was obtained (1983) and when she started school (1982).

[34] The evidence in the record does not corroborate the explanation provided by the respondent's wife. For example, there is no document or affidavit to verify that her name can be written differently and that the late declaration of birth was required in the first grade (1983) and not in kindergarten (1982), the year that she enrolled in school. Consequently, in the Court's view, the panel erred by failing to analyze these irregularities, which raise a doubt about the late declaration of birth. The panel's reasons on this point are insufficient.

[35] Regarding the jurisprudence cited by the applicant—the *Julien*, *Joseph*, *Lubintus* and *Durandisse* cases—the Court observes that the applicant tried to establish that late declarations of birth are *a priori* unreliable as evidence of identity in Haiti. However, the Court notes that the facts of some of those decisions differ from the facts in this case.

[36] In the *Julien* case, the Court held that a doubt persisted about the reliability of a Haitian citizen's late declaration of birth. This doubt was based on the fact that the applicant had stated that her father made her late declaration whereas the evidence showed that the applicant's father had died.

[37] In the *Joseph* case, the panel believed that the procedure for obtaining a late declaration was flawed "because anyone can simply appear before the officer of civil status and declare that someone is his or her daughter to obtain a late declaration of birth and, subsequently, a passport" (paragraph 8). The Court accepts the respondent's argument that the declaration in this case was made following a civil court judgment, not by an officer of civil status, and that it was not demonstrated that the judgment was so flawed that it should have been disregarded.

[38] With respect to the *Lubintus* case, the Court notes that the panel refused to attach any probative value to a Haitian passport issued on the basis of a late declaration of birth. However, in that case, the applicant had not provided any secondary documents. Furthermore, in *Lubintus*, the late declaration of birth was issued 22 years after the applicant was born.

[39] Last, in *Durandisse*, although the panel stated that a Haitian passport issued on the basis of a late report of birth cannot conclusively establish the bearer's identity, the panel also confirmed the special importance of secondary proof of identity in Haiti to corroborate late declarations given the very high rate of fraud and impersonation.

[40] In light of the foregoing, the Court is of the view that determining the validity and probative value of a late declaration of birth is largely a question of fact. Conclusions about identity must be based on all the evidence, and the Court cannot make definitive findings based on the decisions referred to by the applicant. For this reason, although it would have been preferable had the panel dealt with some of the decisions cited by the applicant, failure to do so in this case is not fatal *per se*.

(b) Passport of respondent's wife

[41] The applicant maintains that the panel erred by finding that the passport of the respondent's wife, an authentic document issued by the state, could be used as proof of her identity.

[42] The applicant submits that the panel ignored the fact that the passport was issued on the strength of unreliable documents: her late declaration of birth and her national identity card.

[43] The applicant points out that the appearance of authenticity of a document issued by a foreign state carries a rebuttable presumption of validity (see *Azziz v Canada (Minister of Citizenship and Immigration)*, 2010 FC 663, [2010] FCJ No 767, paragraph 67) and that the Canadian authorities may always challenge the truthfulness of the entries in a foreign passport (see *Azziz*; *Saleem v Canada (Minister of Citizenship and Immigration)*, 2008 FC 389, [2008] FCJ No

482, paragraphs 28 to 31; *Ariyaratnam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1216, [2005] FCJ No 1497, paragraphs 8 and 9; *Ma v Canada (Minister of Citizenship and Immigration)*, 2011 FC 417, [2011] FCJ No 530, paragraph 14).

[44] For his part, the respondent submits that the panel's reasons with respect to the passport should not be reviewable. Essentially, for the respondent, the jurisprudence on the issue of the reliability of passports indicates that a presumption of good faith applies to a passport issued by a national authority, but that presumption may be rebutted by evidence to the contrary regarding how it was obtained. Any one who wishes to disregard such a document must provide detailed reasons, which the immigration officer did not do in this case.

[45] In the Court's view, a passport is sufficient *prima facie* evidence of citizenship (*Varin v Cormier* (1937), DLR 588 (Que. Sup. Ct.); *Radic v M.E.I* (1994), 85 FTR 65; *Adar v M.C.I*, [1997] FCJ 695). However, this presumption is rebuttable and may be refuted if there is evidence to the contrary.

[46] In this case, the passport of the respondent's wife was issued on the strength of her late declaration of birth. The validity of the passport is necessarily compromised if it is based on a document that is potentially unreliable or about which a doubt persists. As explained above, this is the case of the late declaration of birth. Consequently, in light of the doubts raised by her late declaration of birth, it follows that the panel necessarily erred in evaluating the probative value of her passport.

[47] Last, the Court points out however that secondary documents may dispel this doubt.

(c) Secondary documents of the respondent's wife

[48] The applicant disputes the panel's findings with respect to the secondary documents and relies on a number of deficiencies and gaps in the school documents provided by the respondent's wife, her certificates of presentation at the temple, her church card and her national identity card, which the applicant had previously raised at the hearing before the panel. The failings include the following:

- The respondent's wife introduced into evidence a list of marks for the École la Providence for the 1990-1991 school year, issued on February 19, 2008. However, she stated in her application for permanent residence (APR) that she was a student there from October 1982 to June 1990. This document also indicates that she was admitted at Secondary VI, but she wrote in her APR that this institution was a primary school (pages 75 and 266 of the Tribunal Record);
- The respondent's wife provided a list of marks from the Collège Dumarsais Estime for the 1995-1996 school year, issued on February 22, 2008. However, according to her APR, she attended school there from October 1990 to June 1995 (pages 75 and 267 of the Tribunal Record);
- The certificate from the École d'Auxiliaires Sainte Catherine provided by the respondent's wife to the panel is dated September 12, 2000. According to the APR, she was a student there from October 2000 to December 2001 (pages 75 and 270 of the Tribunal Record);
- The certificate from the Hôpital La Sainte-Famille dated April 25, 2002, which is in French, includes words in English like "nursing" and "miss" (page 276 of the Tribunal Record);
- All of the school documents of the respondent's wife contain the same error in the spelling of her last name (pages 268, 270, 271, 272, 274, 275 of the Tribunal Record).

[49] Moreover, the applicant argues that the certificates of presentation at the temple are not independent and verifiable sources. The applicant says that these types of documents are issued by pastors to assist their members and that these organizations do not keep reliable records.

[50] The respondent argues that, after hearing the testimony and explanations of the respondent and his wife, the panel concluded that they were credible. With respect to the spelling errors in the documentation, the respondent submits that all the documents that contain errors are based on the initial erroneous registration of his wife by the director of the École Ste-Catherine. On a balance of probabilities, the respondent maintains that the panel found that his wife's straightforward and consistent explanations were credible, which gave them significant weight in this case. Accordingly, the panel determined that the respondent's wife had established her identity in a reliable manner.

[51] The Court notes that the secondary documents of the respondent's wife were filed to support her identity in light of the late declaration of birth. Although the panel heard the testimony and based its decision on the late declaration of birth, all of the secondary documents filed in the record do not dispel the doubt as to the identity of the respondent's wife, on the contrary.

[52] Although the doubts and contradictions in the secondary documents were raised by the applicant at the hearing before the panel, the panel did not address some of them and disregarded others entirely. For example, at paragraph 19 of its decision, the panel refers to the school documents but does not identify and explain the incongruities and inconsistencies. The panel simply wrote that [TRANSLATION] "with respect to other documents submitted as proof of identity, the appellant filed school documents".

[53] Moreover, the Court finds that the panel cannot remedy this failure by its explanation in paragraph 21 of its decision, which reads as follows:

> [TRANSLATION]
> In assessing the applicant's identity, the immigration officer did not take into account the significant problems faced by Haitian citizens in obtaining documents to prove their identity. This requirement by the immigration officer puts people into a difficult situation and may even prompt them to obtain all sorts of documents that can establish their identity.

In accordance with the *Cepeda-Gutierrez* decision, the Court reiterates that in this case the panel was required to analyze the secondary documents—specifically the school documents—and to explain why it accepted them despite the fact that they contradict or cast doubt on certain facts submitted by the respondent's wife.

[54] In the Court's view, the panel's findings on the school documents, the passport and the late declaration of birth were not sufficiently substantiated and did not take into account the contradictory evidence that was before it regarding the identity of the respondent's wife.

[55] In these circumstances, the Court's intervention is warranted. No question will be certified.

JUDGMENT

THE COURT RULES that the application for judicial review is allowed, the panel's decision is set aside and the matter is remitted to a differently constituted panel for redetermination.

No question is certified.

"Richard Boivin"

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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