



IAD File No. / N° de dossier de la SAI : VB0-04348

Client ID no. / N° ID client : 2915-6966

2012 CanLII 61018 (IRB)

Reasons and Decision – Motifs et décision

SPONSORSHIP

Appellant(s)	Phu Thanh Hau LAM	Appelant(e)(s)
Respondent	The Minister of Citizenship and Immigration	Intimé(e)
Date(s) of Hearing	12 September 2011	Date(s) de l'audience
Place of Hearing	Vancouver, BC	Lieu de l'audience
Date of Decision	17 January 2012	Date de la décision
Panel	Philippe Dore	Tribunal
Counsel for the Appellant(s)	Jay Solomon Barrister and Solicitor	Conseil(s) de l'appelant(e) / des appelant(e)(s)
Designated Representative(s)	N/A	Représentant(e)(s) Désigné(e)(s)
Counsel for the Minister	Laura Merriam	Conseil du ministre

REASONS FOR DECISION

[1] These are the decision and reasons of the Immigration Appeal Division (the “IAD”) concerning the appeal filed pursuant to subsection 63(1) of the *Immigration and Refugee Protection Act* (the “Act”)¹ by Phu Thanh Hau LAM (the “appellant”) from the refusal of the sponsorship application for a permanent resident visa made by her spouse, Trai Hgoc DINH (the “applicant”), from Vietnam.

[2] The application was refused under section 4 of the *Immigration and Refugee Protection Regulations* (the “Regulations”).²

ISSUE

[3] The immigration officer was not satisfied either that the marriage was genuine or that the primary reason for the marriage was other than for the purpose of the principal applicant gaining admission to Canada. The details are set out in the refusal letter³ and in the electronic CAIPS⁴ notes prepared by the immigration officer.⁵

[4] The appellant contends that the refusal is not valid and that the appeal should therefore be allowed. The Minister of Citizenship and Immigration (the “respondent”) submits that the appeal should be dismissed.

BACKGROUND

[5] Ms. Lam is twenty-seven years of age and she is a Canadian citizen. She was landed on July 28, 1993.⁶ She states in her Questionnaire that this is her second marriage and that she has

¹ *Immigration and Refugee Protection Act* (the “Act”), S.C. 2001, c. 27, subsection 63(1).

² *Immigration and Refugee Protection Regulations*, SOR/2002–227.

³ Record, pp. 86- 87.

⁴ Computer Assisted Immigration Processing System.

⁵ Record, pp. 90-95.

⁶ Record, p. 2.

one child.⁷ She testified that she is employed as a supervising cook and that she is paid \$12.00 per hour.⁸ This is her second marriage; she was divorced in July 1999. She testified that she has one child from another relationship, a son, aged five years, who lives with her. Her mother lives with them. Her father is deceased.

[6] Mr. Dinh is twenty-five years old and he lives in Haiphong, Vietnam with his parents and his three sisters who are his only siblings.⁹ He is a citizen of Vietnam.¹⁰ He testified that he works on the family farm, for his parents. He was previously self-employed, as the proprietor of an internet services shop. He testified that he sold the shop in November 2010. He has one relation, an aunt, who lives in East Vancouver, British Columbia.

[7] According to the witnesses' testimony, the couple met by chance while each was on holiday in May 2005. Mr. Dinh said the date was May 11, 2005. They were each on a beach in Halong Bay; Ms. Lam was with a friend. She and Mr. Lau began a casual conversation about a snail shell that he had collected. The applicant states in his Questionnaire that they chatted for about an hour and that they continued their acquaintanceship after Ms. Lam returned to Canada, exchanging emails. He states that they became romantically involved at some point in late summer 2007 after Ms. Lam confided in him that she was unhappy in her first marriage.

[8] Mr. Dinh testified that their next internet contact occurred in November, 2005 and that they next met in person in Haiphong on October 6, 2006. He said that Ms. Lam had travelled there to visit her relations and added that she made a second visit in 2006. He testified that Ms. Lam told him in mid-2006 that she was pregnant and that the father, who is not her former husband, had left her on learning of the pregnancy.

[9] Mr. Dinh testified that the relationship became a romantic one in mid-2008. He said that the two kept in touch and that Ms. Lam raised the subject of marriage in June 2008. Mr. Dinh

⁷ *Sponsor Questionnaire*, IMM 5540, Record, pp.20-24. Unless noted otherwise all information concerning the appellant is drawn from this document.

⁸ *Ibid.*

⁹ *Application for Permanent Residence in Canada*, IMM 0008, Record, pp. 6-13. Except where noted otherwise all information concerning the applicant is drawn from this document.

¹⁰ Record, p. 2.

later responded positively and the couple celebrated their engagement at his parents' home on August 20, 2008. They were married on September 1, 2008.

ANALYSIS

Subsection 4(1) of the *Regulations*

[10] Section 4 of the *Regulations* was amended on September 30, 2010.¹¹ The new provision dealing with “bad faith” marriages, common-law partnerships and conjugal partnerships is subsection 4(1) that reads as follows:

4(1) Bad faith – 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

- (a) was entered into primarily for the purpose of acquiring any status or privilege under the Act: or
- (b) is not genuine.

[11] To succeed on appeal under the amended subsection 4(1) of the *Regulations* the appellant must prove both that the marriage was not entered into primarily for the purpose of the principal applicant gaining any status or privilege under the *Act* and that it is genuine. To dismiss the appeal the panel must find either that the marriage was entered into primarily for the purpose of acquiring any status or privilege under the *Act* or that it is not genuine. The amendment to the *Regulations* does not affect the outcome of this appeal.

[12] The status or privilege that can be acquired under the *Act* in respect of a marriage is that the principal applicant's spouse is granted permanent resident status in Canada through membership in the family class when the spouse qualifies to be sponsored to Canada.¹² The onus lies with the appellant to prove, on a balance of probabilities, that the applicant is not disqualified as a spouse. All applications for permanent residence have, of course, the goal of acquiring status under the *Act*. This broad intent must be distinguished from the disqualification set out in the *Regulations*. A disqualification is established when the evidence shows, on a balance of

¹¹ *Regulations amending Immigration and Refugee Protection Regulations*, SOR/2002–227.

¹² *Act*, subsections 11(1), 12(1) and 13(1).

probabilities, that it was a primary purpose of the relationship to acquire any status or privilege under the *Act*.

[13] The second part of subsection 4(1), the genuineness of a marriage, is addressed by considering rulings on this issue that have been established in the IAD and in the courts. The determination of whether the marriage is genuine is made at the time of the hearing. Marriage is a relationship between spouses. The existence of a genuine marriage is one of fact and it comprises a blend of the past, current and anticipated circumstances surrounding the relationship. Each appeal is unique and the relative importance of the factors will be different in each. The degree of importance will depend upon the nature of the evidence as to the context and environment in which the relationship developed and in which it now exists.

The Immigration Interview

[14] The immigration officer expressed several concerns with the application and these are set out in the refusal letter and in the CAIPS notes. The officer noted that: the applicant's decision to marry an older, divorced woman, who has a child, was unusual; the applicant altered his account of the first meeting, saying that Ms. Lam had been alone at the time rather than with a friend; the applicant's knowledge of the appellant seemed to be superficial; he has not shown that the couple had made plans for settling in Canada or that he would be able to enjoy a relationship with Ms. Lam's son; and the general account of the development of the relationship was not cogent.

The Evidence

[15] Among the items of documentary evidence submitted on behalf of the appellant for this hearing were copies of (with translations as necessary): her certificate of divorce; the household register for Mr. Dinh's family; his "Juridical Curriculum Card"; telephone records; travel documents; money transfer receipts; and of numerous photographs of the couple, some with friends and family members. I note that photographs are often provided in sponsorship appeals.

Although photographs do not independently prove that a genuine relationship exists, they may provide supportive evidence when assessed in light of all of the circumstances and evidence.

[16] There were also eleven pages of material¹³ that were not translated into the English language. I am unable to take into these documents into account.

[17] I have heard the testimonies of the appellant and of the principal applicant. I have studied all of the evidence carefully for any contradictions and inconsistencies that might not easily be reconciled. By themselves such irregularities might not necessarily determine whether or not the marriage is genuine; yet, they gain greater significance if they are prevalent and if, when scrutinized in the context of the documentary evidence, they reveal further anomalies.

The Genuineness of the Marriage

[18] The couple met in mid-May 2005; their relationship appears to have been a platonic one until about mid-2008, according to their testimony. During that period Ms. Lam separated from her first husband, in early 2006, and had a brief relationship at about the same time that resulted in her pregnancy. She testified that the father was a citizen of the United States who returned to that country and with whom she has lost contact. Ms Lam testified that her son was born on December 30, 2006. She was divorced from her first husband on September 7, 2007.¹⁴ Her relationship with Mr. Dinh continued, as it had before, during the next year or so. Mr. Dinh testified that the couple began to develop romantic feelings for each other in mid-2008 and this led to their engagement and then their wedding during the final six months of that year.

[19] This history offers a reasonable explanation for the lengthy time from the first meeting until the wedding. The evidence shows that Ms. Lam was faced with several major personal events in the three year period leading to the couple's engagement. There were the collapse of her first marriage, her pregnancy and her son's birth, her divorce and the rearing of her infant child. Each would present its own challenges, some enjoyable and others unsettling; all

¹³ Record, pp. 57-58, 63-71.

¹⁴ Copy of *Certificate of Divorce*, Record, p. 5.

demanding. Taken together, they could have caused her to become fully absorbed in her legitimate preoccupations with negligible capacity to undertake in a new relationship. It is credible, therefore, that she and Mr. Dinh did not begin to express their feelings for each other until 2008. It is also credible, as the appellant counsel submits, that the lengthy period concerned would reasonably present a challenge to the witnesses in remembering details.

[20] The initial stage of the relationship, whereby the couple became acquainted by means of a chance meeting and then kept in contact as friends for some time by telephone and by Internet is credible. Mr. Dinh testified that, in June 2006, he learned of Ms. Lam's pregnancy and that he learned in September 2007 that she was seeing her boy friend. Throughout this time, the witnesses testified, he had counselled and supported her through the difficulties of her failed marriage. The evidence is that Mr. Dinh became a very close friend to Ms. Lam but not a romantic partner. The romance emerged in mid-2008 according to his testimony. Thus, the better part of a year had elapsed from Ms. Lam's interim relationship until she and Mr. Dinh declared their feelings for each other. I find that the advent of romantic feelings between the couple after two or three years, while unusual, is nonetheless a natural progression in the relationship under the circumstances. This is a lengthy period; however, as I note above, other events could have displaced the beginnings of the couple's romance during this time. The CAIPS notes observe that Mr. Dinh's willingness to marry an older woman who is a divorcée and who has a child from a previous relationship is unusual.¹⁵

[21] This is a concern likely based on a proper acknowledgement of and respect for the customs and mores of the Vietnamese society and it reflects caution in assessing the application. In my view it is helpful to balance such commendable prudence with a corresponding awareness of the norms generally observed in Canada. Mr. Dinh seeks to emigrate from Vietnam to Canada and so it is appropriate to place the key factors of his application in that context. It is very likely that he, his relations and his social circle might consider Ms. Dinh's circumstances to fall outside the norm there; however, it is also likely that he has taken into consideration the differences in such matters that exist in this country, especially in light of Ms. Lam's experience here of eighteen years. I do not consider that this factor weighs against the appellant's case.

¹⁵ Record, CAIPS notes at pp. 92 and 94.

[22] From about mid-2008, when Ms. Lam first suggested the possibility of marriage the pace of the relationship quickened, culminating in the couple's engagement and marriage in late August and early September of 2008.

[23] After the wedding and honeymoon in late August and early September, Ms. Lam returned to Canada. She next visited Vietnam in mid-October and stayed for eleven days. The couple remained apart until late August 2010, according to the applicant's testimony. This is a very long time and it raises a question as to the nature of the marriage. There is no direct evidence as to the reason for such a gap. One might infer that, having married, the couple applied themselves to the sponsorship and its costs and on the direct expenses associated with Mr. Dinh's anticipated emigration. It is also possible that Ms. Lam considered it necessary to focus on rearing her child during this stage of his young life. Whichever the reason I am not persuaded that Ms. Lam was necessarily impeded from visiting Vietnam in 2009 and this weighs against her case.

[24] Ms. Lam's testimony was generally credible and consistent with that of Mr. Dinh. The notable inconsistency was her statement to the appellant counsel that she has visited Vietnam twice since the wedding, both times in 2010. There were no other comparable discrepancies between the witnesses. Ms. Lam had indeed made two trips to Vietnam after the wedding; one was in 2010 and the other in October 2008. In view of the lengthy span of the period considered, nearly two years, and the time that has passed since, I attribute the discrepancy to the normal imperfections in recollection that many people would have after such time has passed.

[25] Mr. Dinh's testimony was forthright and credible. He described the couple's first meeting and subsequent events generally according to the appellant's account and to the documentation. There were one or two apparent discrepancies between his evidence and that of Ms. Lam. For example, he said that Ms. Lam decided against having her son accompany her on her visits to Vietnam because of the climate and, in particular, the mosquitoes. She had testified simply that the boy was too young to travel with her. This is not necessarily a discrepancy; Ms. Lam's comment could be a broad assessment reflecting her concern with her son's vulnerability to a number of perceived contingencies, including the climate and mosquitoes.

[26] The immigration officer considered the applicant's knowledge surrounding Ms. Lam's personal life to be superficial. The hearing offered an opportunity to examine the witnesses' knowledge of each other to a degree that was not available to the immigration office. Each gave satisfactory testimony in this regard. Ms. Lam summarized Mr. Dinh's background, his liking of soccer, his family circumstances, and their shared preferences. She correctly stated that Mr. Dinh was employed in farming and that he had previously operated an Internet café although she could not remember when he had closed the shop. This was no more than a minor slip resulting from imperfect recall. Mr. Dinh was fully knowledgeable about Ms. Lam's son; his birthday, and his likes and dislikes. Mr. Dinh was also familiar with the nature of Ms. Lam's employment; her employer, her responsibilities, and her typical schedule. He also correctly described her previous occupation as the owner of a noodle restaurant.

[27] One incident is helpful in showing the couple's familiarity with each other. The respondent counsel asked the appellant to describe her favourite experience at the wedding. Ms. Lam replied that it occurred just after the celebration when most of the guests had left. She added that she had been awake since 4:00 a.m. that day and that she was tired as a consequence. Counsel later asked the applicant to give his own understanding of Ms. Lam's favourite experience; he replied that it was when she was congratulated by their relations. This is consistent with one spouse's perception of the other at the end of a demanding day; Ms. Lam was very likely happy to be congratulated by her relations because that protocol was one of her final obligations and a rest was just around the corner. The respondent counsel aptly asked an unanticipated question and the answers were undeniably genuine; they were not rehearsed. Overall, each witness testified in a straightforward and credible manner; neither gave any indication that they had rehearsed any of their answers.

[28] Both testified that Ms. Lam sends money to assist Mr. Dinh with his living expenses. There is documentation of six cash transfers, three in 2008 and a further three in 2011 for a total of \$3,600. In view of Ms. Lam's limited income this is notable support. It was not provided regularly; there were three payments totalling \$1,700 in November and December of 2008 which is consistent with a contribution towards the cost of the wedding and engagement celebrations. She next sent funds in May and July of 2011 in the total amount of \$1,900. There is no

documentation that she sent money to Mr. Dinh in either 2009 or 2010. This is intriguing because it would be reasonable to expect a more-or-less regular flow of money, even if the amounts were small. It is possible, on the other hand that the couple agreed to forego the transfers in order to address a higher priority. Regardless, the absence of an explanation weighs against Ms. Lam's case to a certain degree.

[29] There are few indications that the couple have adequately considered the practical aspects of their future together beyond one or two basics. Ms. Lam testified that they would live with her mother and that Mr. Dinh would seek any job that would offer the assurance of a steady life. She added that they had discussed whether to have children and that they had decided on one child. She said that, if the appeal should not be successful, she would continue to visit Mr. Dinh in Vietnam and that they would have a child in any case. His testimony was substantially consistent with hers in all respects. He added that, in the event of an unsuccessful appeal, they would consult a counsel with respect to a future application. The testimony of both witnesses on their plans was consistent with an elementary intent to live as a married couple in Canada; however, it was very limited for two people who have had almost three years to consider and their future together. This weighs against the appellant's case to a small degree.

[30] The appellant submitted numerous photographs taken of the wedding and of the couple in various formal and informal settings, many with Mr. Dinh's son and her mother and family. A careful examination of the photographs suggests that the relationship is authentic. Mr. Dinh testified that the photographs of the celebrations were taken on August 26 and September 8, 2008 and that others were taken on the couple's honeymoon. Two groups of photographs show the couple in different formal attire and in different settings, suggesting that they were taken at the engagement and at the wedding. There are also photographs of two, or perhaps three, informal excursions. Most show the couple by themselves although Mr. Dinh's parents and one or two other persons appear in a few. I find that, although several of the photographs appear as though they were taken primarily to establish a visual record, those of the engagement and wedding were taken to record genuine celebrations. There is nothing in the photographs that would weigh against the appellant's case; however, given that there is none taken during other visits by Ms. Lam, the photographic evidence provides limited support for her case.

[31] The purpose of the hearing of this appeal is to assess the evidence presented against the precise test articulated in subsection 4(1) of the *Regulations*. The onus lies with the appellant to demonstrate that the marriage is a genuine one. To do so she must cross the threshold defined by the balance of probabilities. In weighing the evidence and testimony it is the sum of individual deductions, each determined from the full context of the relevant circumstances and measured against the scale of probability, that lead me to my decision. I have thus examined the factors in this case from the perspective of the entire framework of evidence so as to assess their relative weight equitably.

[32] The instances of the appellant's vagueness during her testimony are relatively minor and I attribute them to the normal lapses in memory that can be expected over a period of several years. They are not enough in themselves to cast doubt on the genuineness of her marriage to Mr. Dinh. Nonetheless, there are some matters that are not so easily dismissed: the gap in Ms. Lam's visits of more than a year in 2009 and part of 2010; her confusion over the number of visits she made in 2010; and the gap in funding assistance. Upon careful assessment I conclude that, while they are not adequately explained, neither are they sufficient in light of all the evidence to lead to a determination that the marriage is not a genuine one. The relationship and marriage have fundamentally progressed in a manner consistent with a mutual spousal commitment. Both witnesses were sufficiently credible in demonstrating to a satisfactory degree the mutual knowledge, the interdependence and the intention for a sustained future together that would be expected of a genuine marriage.

The Primary Purpose of the Marriage

[33] The question as to whether or not the marriage was entered into primarily for the purpose of acquiring any status or privilege under the *Act* is also answered by examining the evidence on the issues discussed above. The advantage sought in appeals of this nature is usually entry into Canada and the granting to the principal applicant of permanent resident status as a member of the family class. In this regard the term 'primarily' means that the objective of gaining admission must be "the dominant driving force"¹⁶ behind the marriage for the principal applicant

¹⁶ *Singh, Ravinder Kaur v. M.E.I.* (I.A.D. 86-10228), Chu, Suppa, Eglington (dissenting), August 8, 1988, at 5.

to be caught by subsection 4(1) of the *Regulations*. I am satisfied that this is not the situation in this case. Inferences can be drawn from the evidence, and a finding made, that immigration is not the primary objective of the marriage between the appellant and the principal applicant.

DECISION

[34] After carefully considering all of the evidence, including information that was not available to the immigration officer, I find that, on the balance of probabilities, the appellant has demonstrated that the marriage is genuine and that it was not entered into primarily in order to acquire a status or privilege under the *Act*.

NOTICE OF DECISION

The appeal is allowed. The immigration officer's decision to refuse a permanent resident visa is set aside, and an officer must continue to process the application in accordance with the reasons of the Immigration Appeal Division.

(signed)

“Philippe Doré”

Philippe Doré

17 January 2012

Date

Judicial Review – Under section 72 of the *Immigration and Refugee Protection Act*, you may make an application to the Federal Court for judicial review of this decision, with leave of that Court. You may wish to get advice from counsel as soon as possible, since there are time limits for this application.