LA COMMISSION DE L'IMMIGRATION ET DU STATUT DE RÉFUGIÉ (SECTION D'APPEL)

IMMIGRATION AND REFUGEE BOARD (APPEAL DIVISION)

MOTIFS DE DÉCISION ET ORDONNANCE
REASONS FOR DECISION AND ORDER

MA0-11240

APPELANT / **APPELLANT**

Celine **FRECHETTE**

INTIMÉ / **RESPONDENT**

La Ministre de la Citoyenneté et de l'Immigration
The Minister of Citizenship and Immigration

DATE(S) ET LIEU DE L'AUDIENCE / **DATE(S) AND PLACE OF HEARING**

November 5, 2001
Montreal

DATE DE LA DÉCISION / **DATE OF DECISION**

November 23, 2001

CORAM / **CORAM**

M^{e} Martine Lavoie

POUR L'APPELANT / **FOR THE APPELLANT**

M^{e} Jacques Beauchemin

POUR L'INTIMÉ / **FOR THE RESPONDENT**

Jean-Denis Saint-Pierre

MA0-11240

Céline **FRÉCHETTE** (the appellant) is appealing from the refusal of the sponsored application for landing made by her husband, Moulay Taib El Ouardighi (the applicant), a citizen of Morocco.

The letter of refusal sent to the applicant on November 16, 2000 indicates that, after studying the file, the visa officer came to the conclusion that the application should be refused because Mr. El Ouardighi is a person who comes under section 4(3) of the *Immigration Regulations, 1978* (the Regulations) which reads as follows:

> 4(3) The family class does not include a spouse who entered into the marriage primarily for the purpose of gaining admission to Canada as a member of the family class and not with the intention of residing permanently with the other spouse.

FACTS

The appellant is a Canadian citizen, 35 years of age and the mother of an 8-year-old boy. In June 1999, she met the applicant, a Moroccan citizen, 27 years of age, who was visiting his sister in Canada for three months.

After this meeting, they stayed in contact and the appellant went to Morocco in December 1999. They were married on January 5, 2000 in Morocco. The appellant went back to Morocco for a month in April 2000 and for two weeks in September 2001.

ANALYSIS

It is the appellant's responsibility to show that, on the balance of probabilities, her husband did not marry her primarily for the purpose of gaining admission to Canada as a member of the family class and did intend to reside permanently with her. A hearing, as part of an appeal under section 77 of the *Immigration Act* (the Act) is akin to a *de novo* hearing and the Immigration Appeal Division (IAD) can take into consideration additional evidence that the visa officer did not have.

In her statutory declaration given in accordance with the Act and Regulations, the visa officer who interviewed the applicant stated as follows:

> [translation] I concluded the interview by informing the candidate that he had not satisfied me as to the authenticity of his relationship with Ms. Fréchette and that he had not shown beyond a reasonable doubt that he had not married the sponsor solely for the purpose of obtaining permanent resident status in Canada. (exhibit 5, page 11).

It should be mentioned from the outset that the visa officer imposed a higher burden of proof on the applicant than is required by jurisprudence. The burden on the applicant is in fact based on the balance of probabilities. Therefore, a significant error in law was committed by the visa officer who wanted the applicant to prove the genuineness of his relationship beyond a reasonable doubt.

The visa officer also reported that, after several unsuccessful attempts to call the appellant when no one answered the telephone, she left a message on the appellant's answering machine asking her to call back. Since she did not receive a response from the appellant, she concluded that the relationship was not genuine and that the marriage had been contracted solely for the purpose of enabling the applicant to obtain permanent residence in Canada and not with the intention of residing permanently with the appellant. She concluded her Computer Assisted Immigration Processing System (CAIPS) notes with the following statement:

> [translation] Silence on the part of the sponsor and the candidate not taking any action regarding the file indicate to me that the relationship between the spouses is not genuine (exhibit 7, page 16).

The visa officer placed particular importance on the appellant's silence. The applicant's intention at the time of the marriage is also very important and may be determined from the appellant's testimony and inferred from the documents and facts submitted. Here I must mention that the appellant seemed to me to be a very credible person. The same goes for the applicant's sister who testified at the hearing.

The appellant testified directly and spontaneously in a very frank and open manner. Like her sister-in-law, Souad, she answered all the questions without any hesitation and provided many details. Therefore, we have no reason to doubt the truthfulness of the reasonable explanations provided by the appellant in response to certain concerns raised by the visa officer. Her silence in response to the telephone messages that the visa officer claimed to have left her seems to be a determining factor in the decision to refuse the applicant's sponsored application for landing in Canada. The appellant testified that she never received such a message on her answering machine. She explained immediately after her interview with the visa officer that her husband had told her he was going to be calling her. Therefore, she stayed close to home for three days and limited her telephone conversations in order to be able to receive this telephone call.

The appellant said that she was very much in love with her husband and that she would have had no interest in not returning this call. Therefore, I find that there must have been a technical problem in communication between the visa officer and the appellant who claimed that she never received this call. The appellant explained however that the visa officer allegedly spoke to her sister-in-law, Souad. She said that the federal government employee wanted to speak to Souad's husband and asked how to reach him.

The appellant said that her marriage was not an arranged one, but a marriage based on love. In fact, although her husband has a sister living in Canada, their meeting took place by chance. In June 1999, the appellant and about a dozen friends went to the home of the applicant's sister, Souad El Ouardighi, for a country-style meal to celebrate a birthday. On that day, the applicant, who was visiting his sister in Canada, came to lend hand with the meal. He saw the appellant and danced with her at the end of the meal. The applicant asked the appellant for her telephone number and called her the next day. It was love at first sight and, from that moment on, the future spouses were inseparable. They saw each other every day until the applicant left for Morocco in September 1999. Two weeks after their meeting in June, the applicant introduced the appellant to his sister Souad.

In the fall, the applicant's mother came to Canada and Souad, who had developed a friendship with the appellant, introduced her to her mother. The appellant reported with emotion and a smile in her voice that even when her husband arrived in Morocco in the middle of the night, he called her immediately. She filed exhibits A-1[i] and A-2[ii], which show the numerous telephone calls and the rather substantial written correspondence between the future spouses.

Around November, the applicant sent the appellant an airline ticket for her to go to visit him in Morocco in December 1999. As the letters that the applicant sent the appellant between September and December 1999 show, the couple had already discussed their religious differences, the appellant being Catholic and the applicant Muslim, as well as the presence of the appellant's child in their relationship. The applicant had also brought up marriage as a means of fulfilling his desire to live with the appellant. However, the appellant did not go to Morocco with the intention of getting married. In fact, she explained that she wanted to get to know the applicant better, meet his family and visit his country.

However, once in Morocco, in a harmonious relationship and happy together, the couple had the idea of collecting all the documents they would need to get married at some time in the future.

The appellant explained that, on January 5, 2000, when they were in the office of the register of civil status, they were told that they had all the documents they needed for a civil ceremony to take place immediately. The appellant said that she was taken by surprise and felt she needed a moment to think. The spouses then went to a café to talk. The appellant explained that she was a reasonable person who did not make such decisions lightly. She said that she was well aware that, in addition to affecting her life, this decision would have significant repercussions on her child's life. The appellant is also nine years older than the applicant. She explained that this fact concerned her. After a few moments of discussion, the spouses decided that their love was such that they should be married, which would enable them to live together and end their long-distance romance. Consequently they were married on January 5, 2001in a very private legal ceremony with only one witness. There was no reception after the wedding since the applicant's uncle had died a few days earlier and the family was in mourning. The appellant filed a copy of the uncle's death certificate. Since the applicant's mother was in Saudi Arabia for Ramadan, she was not present at the wedding. The applicant's brothers and sisters were all informed after the wedding. The appellant testified that it was her wish that the wedding be very private. She said that she did not even want her husband's brothers and sisters to be present. Souad was in Morocco at the time as she is every year during Ramadan. She arrived there a few days before the appellant. However, she did not attend the wedding because she was with her bereaved aunt.

The circumstances in which the future spouses met do not give the impression that this was an arranged marriage as the visa officer contends in her CAIPS notes. However, the circumstances in which the wedding occurred, according to the appellant's testimony, could raise some questions in the panel's mind about the applicant's intentions at the time of the wedding. In fact, the apparent discrepancy between the testimony given by the appellant and her sister-in-law, both deemed credible, could raise some questions with the panel. Whereas the appellant said that she left Canada for Morocco in December 1999 without having made the decision to get married, her sister-in-law spoke of marriage preparations.

She also reported a conversation that her brother had with their older sister before the appellant went to Morocco in December 1999. The older sister told her that, during this conversation, of which she did not know all the details, it came out that, in the applicant's mind, he was planning marriage with the appellant. The plan seemed so serious that the older sister felt she should mention her travel plans for Ramadan.

Similarly, whereas the appellant testified that she had had her hands painted with henna out of cultural interest and with no direct connection to the wedding, her sister-in-law mentioned that the services of a calligraphy artist had been reserved some time before. It is not unreasonable to deduce from these discrepancies in the testimony that the applicant had plans that were not known to the appellant before she went to Morocco in December 1999. Therefore, we need to ask whether the applicant's plans, presumably unknown to the appellant, compromised his good faith at the time of the wedding. I do not think so. In fact, even if the applicant had had an agenda that was unknown to the appellant, nevertheless, in the circumstances in this case, there is no doubt that he intends to reside permanently with his wife. I do not think that this factor is sufficient to negate all the evidence in the file, notably with respect to the development of the relationship between the spouses, even after the marriage, their actions after the marriage and the couple's plans for the future.

In fact, as exhibit A-2 shows and according to the appellant's credible testimony, it is not rare for the spouses to write one another two or three letters a week. A few letters addressed to the appellant's son were also filed in evidence. The appellant explained that she had sent her husband various crafts made by her son and all kinds of items to inform him about Canada, most recently, some autumn leaves. The appellant explained that the spouses call each other every day. Once again, the telephone bills (exhibit A-1) confirm this statement.

Moreover, in addition to the trip to Morocco during which she got married, the appellant has returned to Morocco twice. The first time was for her birthday in April 2000 and the second time in September 2001. Whereas her first trip was done at her husband's expense, she paid for the last two. At the hearing, she showed the panel a number of photographs taken of the couple during her three trips to Morocco. In several of these photographs, the spouses seem to be very happy to be together. We also have copies of the appellant's airline tickets in evidence (exhibit A-4).

The couple discussed future plans. The appellant said that she had even thought of moving to Morocco with her child when he was older if her child's father, with whom she never married, would allow it. She maintains that if her appeal were dismissed, she would go to live in Morocco with her husband and would leave her child with his father for approximately a year. The appellant has looked into a potential employer for her husband. In fact, the husband of one of her friends would be prepared to hire him to do construction work. The applicant is a professional soccer player in his country. However, various work certificates were filed by the appellant and indicate the different jobs that the applicant has

had in the hotel industry and as a labourer. The appellant said in passing that the visa officer's statement in the CAIPS notes to the effect that the applicant was living off his family was untrue. She explained that, because of his mother's illness, the applicant moved back in with her, but was not financially dependent on her. In any event, the couple has obviously discussed their future and the appellant has taken steps to help her husband integrate into Canadian society and facilitate their life together.

The appellant explained that their marriage was publicized to the extent that her husband's family, friends and neighbours were all informed. She added that she would like to have a reception in Canada and even said that her marriage would not be recognized here. Consequently, she wants to be remarried at the Quebec City Court House. With respect to holding a reception in Morocco, the appellant explained that she was not interested in the highly pompous weddings held in Morocco. She said that she did not want a wedding that went on for three days with lots of guests. She returned twice to Morocco and told her husband that she did not see the need to have a large reception.

The applicant's mother, who is a practising Muslim, apparently reacted very well to the marriage. In her testimony, the appellant's sister-in-law explained that, aside from the marriage of one of her brothers, the six other marriages in her family were all marriages based on love. Her mother, who wants only her children's happiness, had no objection and was very pleased when this marriage was announced. The appellant's child would be accepted by both the applicant and his family. Some of the photographs filed by the appellant show the child with the applicant and they seem to be having a lot of fun together. According to the appellant's testimony, they have a very good relationship. The applicant considers the appellant's son as his own. Moreover, the appellant has informed the applicant that she will not be able to have children with him. In the circumstances, her husband would consider her son to be his even more.

In conclusion, like the Minister's representative, I find the appellant to be credible. Although the Minister's representative wondered whether the applicant's intention at the time of the wedding was compromised by the fact that he had an agenda unknown to the appellant, nevertheless, on the whole the appellant was able to respond to the visa officer's concerns on which she based her refusal. I find that the applicant's unstated intentions regarding his plans for the future with the appellant are not incompatible with his good faith at the time of the wedding.

Based on all of the evidence submitted by the appellant, I find that, on the balance of probabilities, the applicant is not a person who comes under section 4(3) of the Regulations.

Consequently, the appeal is allowed in law.

ORDER

The Immigration Appeal Division orders that the appeal be **allowed** because the refusal to approve the application for landing submitted by Moulay Taib El Ouardighi is not in accordance with the law.

Martine Lavoie

M^e^ Martine Lavoie

Dated in Montreal, this 23rd day of November 2001.

You have the right under ss. 82.1(1) of the Immigration Act to apply for a judicial review of this decision, with leave of a judge of the Federal Court - Trial Division. You may wish to consult with counsel immediately as your time for applying for leave is limited under that section.

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[i] Exhibit A-1: Telephone bills.

[ii] Exhibit A-2: Correspondence between the spouses.