Federal Court  Cour fédérale

Date: 20190827

Docket: IMM-694-19

Citation: 2019 FC 1105

Ottawa, Ontario, August 27, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

LEONAT PRETASHI

Applicant

and

CANADA (THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS)

Respondent

JUDGMENT AND REASONS

[1] This judicial review is of an Immigration Appeal Division [IAD] decision to uphold an exclusion order made against the Applicant on the basis of misrepresentation under s. 40(1)(a) of the *Immigration and Refugee Protection Act*, (S.C. 2001, c. 27) (*IRPA)* and that there were insufficient Humanitarian and Compassionate [H & C] considerations to warrant relief under s. 67(1)(c) of the *Act*.

[2] The application is dismissed for the following reasons.

I. Facts

[3] The detailed facts are set out in the CTR and, since there are several different explanations with respect to a number of events, I will only briefly address the most salient facts.

A. *Background*

[4] The Applicant is a 41 year-old Albanian Citizen who was granted permanent residency in Canada because he was sponsored by his wife, who is a Canadian Citizen now 62 years old [first wife]. The Applicant and his first wife met in Greece in 2001 when they were both on holiday. Following her return to Canada, they continued to communicate and his first wife visited the Applicant in Albania in January, March and June of 2002.

[5] In June 2002, his first wife filed a sponsorship application for the Applicant as her fiancé. In October, 2002, they were married in Albania. In December, 2003, the Applicant's permanent residence application was approved after interviews due to the parties' age difference and his lack of English.

[6] However, in June, 2003 and unbeknownst to his first wife, the Applicant began a relationship with then 14 year-old Xhuljana Cotaj , an Albanian citizen [Xhuljana] who he had met in 2002. It appears that they lived together in a common law relationship from September, 2003 to December, 2005. In September, 2005, Xhuljana gave birth to their son.

[7] Although the Applicant's permanent residence application was approved in December, 2003, the Applicant did not attend the consulate to pick up his documents. His first wife traveled to Albania in January, 2004, and was unable to find the Applicant. The Applicant's family told her that he was in Greece. Her evidence is that during this visit, one of the Applicant's cousins told her that the Applicant's parents were lying and they just wanted Canadian visas.

[8] The first wife went to the Canadian consulate and attempted to cancel the sponsorship. It is not clear where the Applicant actually was at this time as there were several explanations given. In 2005, he told a Citizenship and Immigration Canada [CIC] Officer that he had been in hiding because he was wanted by the police for failure to pay a fine ($1,180.00 CAD) from a conviction for driving without a licence. The Immigration Division [ID] found this story plausible because he provided court documents and receipts. However, at the ID hearing, he testified that the reason he was absent was that he did not want to see his wife because he had mixed feelings for Xhuljana and never mentioned any fine.

[9] The Applicant and his first wife spoke again a few months later and he convinced her that there had been a misunderstanding, explaining to her that he was missing because of the fine. In September, 2004, his first wife visited Albania again. When she arrived at the Applicant's house she met Xhuljana and her husband in state of undress. But the Applicant and his family convinced her that the young girl was the Applicant's cousin.

[10] In October, 2004, the first wife submitted a new sponsorship, which was approved. On December 16, 2005, the Applicant came to Canada and he started to receive nightly calls from a

woman with a baby crying in the background but he told his first wife it was a friend's wife from Italy. Shortly after arriving, he became verbally abusive and threatening and the first wife eventually told him to leave her home, which he did by August, 2006. The first wife had difficulty divorcing the Applicant and, in 2009, eventually traveled to Albania to divorce him.

[11] On December 26, 2011 following the divorce, the Applicant married Xhuljana and in 2012 attempted to sponsor her as a permanent resident.

[12] In May 2013, a CIC Officer interviewed Xhuljana in Albania. She told the Officer about how they had met in 2003 and lived together. She explained that she and the Applicant agreed that he should marry his now ex-wife and move to Canada "only" in order to get documents so they could both move to Canada. The same Officer interviewed the Applicant, who denied that they lived together from 2003 until 2005, and said that they only had a one-night stand. When the Officer interviewed them together, they were unable to explain the inconsistences. Xhuljana's permanent residence application was refused.

[13] This interview prompted a further interview in November, 2013 in Edmonton. During the Edmonton interview, the Applicant said several other things which appear to have been untrue. He told the Officer that he had lived with his first wife for three years after moving to Canada, not one. He again insisted his relationship with Xhuljana had been a one-night stand. He said that he only met Xhuljana nine months before the birth of his child (i.e. January 2005).

[14] The CIC also investigated whether his first wife had been complicit in the apparently fraudulent marriage. A CBSA Officer [Officer B] interviewed the first wife to determine how much of the scheme she was aware of, and whether she was aware of Xhuljana being in the picture. Officer B acknowledged that during the interview, he probably disclosed to the first wife what Xhuljana had said during the interview about how the Applicant had only married the first wife for status. The investigation determined that the first wife had not been complicit and that she would be asked to be an independent witness at the ID hearing.

[15] There were many different stories and time frames as to when the Applicant was in love with whom, but he basically deceived his first wife regarding both his relationship with Xhuljana and that he had a child. The investigations led to the Respondent alleging that the Applicant was ineligible under subsection 40(1)(a) of the *IRPA* for misrepresentation, specifically for withholding material facts during his permanent resident visa application. In April, 2017, the Immigration Division [ID] conducted an Admissibility Hearing.

B. *ID Decision*

[16] During this hearing, the Applicant changed his story again. The Applicant admitted he knew about the birth of his son (in September, 2005) prior to his landing (in December, 2005), and that he had been living with Xhuljana. However, he claimed that his first marriage was genuine and that he only loved his wife at the time he landed and did not love Xhuljana. He says he only began to love Xhuljana in 2011, after his divorce from his first wife. Another rendition was that he only lived with Xhuljana because he was pressured into it by his and Xhuljana's traditional families, and if they had not lived together, it could have caused a violent feud over

family honour. The Applicant said that the reason he did not pick up the travel documents from the consulate in December, 2003, was attributable to confusion since he had a three month old baby. However, the ID points out that the baby was not born until September, 2005, so this explanation did not make sense.

[17] During the hearing, the Applicant was asked whether he told Xhuljana that he only married his first wife for immigration documents. The Applicant testified that he had not told Xhuljana this, but that he also did tell her, but he was untruthful because otherwise she and her family would be upset that he was marrying someone else.

[18] The Applicant testified that there was proof of his love of his first wife, since she had told him to move out, that they divorced several years later, and that he did not ask for a property settlement. The ID however noted that he had threatened her until she asked him to leave, the divorce took time because it was difficult because the Applicant refused to cooperate, and that they had a marriage contract to prevent him from seeking property.

[19] The ID ultimately determined that the Applicant was not credible, that he had a tendency to lie his way out of problems, and that on the balance of probabilities, he married his first wife as a way to gain money and obtain permanent residence. The ID found the entire family had a stake in the deception as Albania is a poor country and the first wife had already purchased a cell phone as they had no phone, a new stove, and pots and pans for the parents and the Applicant. She was also going to buy a horse to till the land. The ID determined that if he genuinely loved the first wife, he would not have begun his relationship with Xhuljana, and would not have

treated his first wife the way he did when he came to Canada. The ID found misrepresentations regarding the marriage, the common law relationship, and the undeclared birth of his son. He was issued an exclusion order because of the misrepresentations.

[20] The Applicant subsequently took issue with the pre-hearing interactions between the Officer and the first wife, as the Applicant perceived the conversations as tainting the first wife's evidence by improperly sharing inflammatory information about the marriage being fraudulent with the first wife. The Applicant later requested copies of any correspondence or notes between the Minister's Counsel and/or Officer B and the first wife, and this was disclosed to him after the ID hearing.

C. *IAD Decision*

[21] At the IAD, the Applicant conceded the misrepresentation regarding his son and the IAD found that this misrepresentation was serious and sufficient enough to establish the validity of the removal order The IAD did not engage with the ID's other findings and moved onto the H and & C considerations. The IAD stated: "The panel finds that the applicant Appellant has engaged in a lengthy pattern of deception with Canadian officials. The panel agrees with the assessment of the ID Member that the Appellant has attempted on numerous occasions to mislead Canadian officials to his benefit." After going through the Humanitarian and Compassionate (H & C) factors, the IAD found that there were insufficient H and & C considerations to warrant special relief. The IAD also found that the interactions between the first wife and the Minister's Counsel and/or Officer B were not determinative or relevant.

II. Preliminary Issues

A. *New Evidence*

[22] In his Further Memorandum of Argument, the Applicant put forward new evidence. He described a pilot program that had been announced by IRCC starting in September, 2019 whereby non-accompanying family members who had not been declared (and were ineligible under section 117(9)(d) of *IRPA*) would now be allowed to be sponsored. The Applicant further argued that the new evidence, though not before the decision maker, should be considered as it meant that the failure to disclose his son is at "the lower end of the spectrum of seriousness." The Applicant further argued that this new evidence would fundamentally change the best interests of the child analysis as "individuals such as the Applicant will be able to bring their children over to Canada." He further claimed that this is a "game changer in the BIOC analysis".

[22] I disagree. Firstly, this is not evidence as it is argument presented in a further memorandum and there is no affidavit evidence related to this issue. Furthermore, this future pilot project is not the law and this does not fit within any of the exceptions to allowing evidence that was not before the decision maker as it does not relate to procedural fairness.

B. *Clean Hands Doctrine*

[23] Another preliminary issue was raised by the Respondent. The Respondent argued that I should exercise my discretion and not hear the merits as the Applicant does not come to the Court with clean hands, or in the alternative I should not grant the relief. The Respondent relies

on the FCA's finding regarding the doctrine of clean hands in *Canada (MCI) v Thanabalasingham*, 2006 FCA 14 (Evans JA) and *Debnath v Canada (MIC)*, 2018 FC 332, (Strickland J).

[24] While I agree that, throughout the many immigration processes, interviews and hearings, the Applicant has not been credible or truthful I do not agree that the clean hands principle in the above cases is applicable on these facts. The FCA (at para 9) and Justice Strickland (at paras 23–25) both were dealing with applicants that, after the decision under review, had done things that meant they came to the Court with unclean hands. I do not see that in this case as the things the Applicant has done all occurred before the immigration processes and during, but not since the decision that is currently before the Court. For that reason I am dealing with the matter on the merits.

III. Issues

[25] These were the issues presented by the Applicant in his submissions:

1) Was the IAD unreasonable by not considering the Applicant's argument about the Minister's Counsel? (see below)
2) Was the Applicant's right to procedural fairness violated when the Minister's Counsel (see below) spoke to the first wife and the IAD subsequently denied the ability to cross-examine her?
3) Were the IAD's findings that the Applicant was not credible and entered into a bad faith relationship unreasonable?

4) Were the IAD's findings unreasonable because the H & C factors were assessed through a "prism" of the Applicant's inadmissibility?

It would seem that the procedural fairness issues now center on conversations between the first wife and Officer B and not the Minister's Counsel. For that reason I will refer only to Officer B.

IV. Standard of Review

[26] The standard of review is reasonableness for the substantive decision, and correctness for procedural fairness: *Dunsmuir v New Brunswick*, 2008 SCC 9 (at para 47); *Johnny v Adams Lake Indian Band*, 2017 FCA 146 (at para 19).

V. Relevant Provisions: See Appendix A

VI. Analysis

A. *Issues one and two: Procedural fairness and the officer's interactions with the first wife*

(1) The interactions with the first wife did not make the IAD's decision unreasonable

[27] Issues one and two were combined at this hearing. The issue as argued at the hearing is: Whether there was a breach of procedural fairness by the IAD when the member did not allow the first wife to be questioned by the Applicant given the disclosure of communications between the first wife after the ID hearing?

[28] The Applicant submits that the "bad faith" relationship, or as it was referred to in the hearing the "scam first marriage," is a "central issue" to this appeal. In his memorandum (at paragraph 19), the Applicant did not provide supplemental details to the argument. However at the hearing it was fleshed out when the Applicant argued that the IAD could not parse out the testimony of the first wife when the IAD made their decision. The Applicant therefore said it was procedurally unfair for the IAD not to allow the Applicant to cross-examine the first wife after the Applicant learned that Officer B had spoken to her and disclosed some statements made by the second wife before she was a witness at the ID hearing. The Applicant felt it may have affected her status as an independent witness.

[29] To unpack this argument the actual decision under review and the facts of this case must be considered.

[30] First I do believe a decision maker can parse out and disregard certain evidence. Judges do this when hearing a *voir dire*. In this case the evidence given by the first wife also came from the Applicant or his second wife. Having the evidence from the Applicant and his second wife before the IAD made it possible for the IAD not to have to rely on the first wife's testimony.

[31] But of course the IAD was clear (at para 10) that the determinative factor was the misrepresentation of the Applicant regarding not disclosing his son. As the IAD found, this was a serious misrepresentation being that when he was given his PR status in December, 2016 he had a son (born September, 2005) with another woman and he was in a common law relationship with her. Not disclosing the son precluded an investigation of his PR application by Canadian

Immigration officials. The IAD's finding that this is a serious misrepresentation is reasonable and the finding that it was determinative is also reasonable. Finally, the finding that this was all the IAD needed to find that the exclusion order was valid was further reasonable.

[32] Factually the second part of the Applicant's argument regarding a breach of procedural fairness must fail as the IAD did not need to rely on the first wife's testimony as the determinative issue was the misrepresentation of not disclosing the Applicant's son. End of story.

[33] The IAD reasonably concluded that the issue of fraudulent marriage was not determinative. The relevant findings – that the Applicant was not credible, and the serious misrepresentation regarding the child – were determinative. The misrepresentation regarding the child and that he had not declared his common law relationship at the time both did not rely on the first wife's testimony. The Applicant himself admitted to lying repeatedly and making the misrepresentation about his child. As well Xhuljana gave evidence that they were in a common law relationship at the time of the sponsorship.

[34] Any misrepresentations surrounding his first marriage are not relevant to the determination as confirmed by the IAD. It also does not meaningfully connect to the H & C factors: as the Respondent points out, there is plenty of information from the Applicant himself to show his lack of credibility. It was not necessary for the IAD to consider the argument surrounding the Minister's Counsel telling her information and somehow making her testimony

not independent. There was no error in the IAD not considering whether there actually was a breach of procedural fairness.

(2) The decision was procedurally fair

[35] The second part of the argument regarding the procedural unfairness must also fail. Even if I am wrong and the first wife's testimony could not be parsed from all the other evidence surrounding the misrepresentations, I do not find there was a breach of procedural fairness.

[36] As an alternative argument, the Applicant submits that his procedural fairness was breached at the level of the ID because Officer B shared information with his first wife about the interview with Xhuljana where she stated the marriage was for immigration purposes. The Applicant puts forward that this sharing might have influenced his wife's impression of events because it was inflammatory. The Applicant submits the IAD was incorrect to find these concerns "highly speculative" or not inappropriate. The Applicant also submits this disclosure was inappropriate because the Applicant did not give consent as required by the *Privacy Act*.

[37] Again I disagree.

[38] Officer B had a normal interview with the Applicant's first wife who was his sponsor, to determine whether she was complicit, and whether she should be called as a witness. Even if the IAD could consider the *Privacy Act*, there was no breach because Officer B was using the information for purposes consistent with the reason it was obtained: attempting to identify immigration fraud, by determining whether his first wife was part of the scheme.

[39] In any case, the idea that this information had any impact on his first wife's testimony is speculation. Her testimony just re-iterated facts she already knew, including: that she had suspected the Applicant had another wife; that, as even the Applicant's cousin had told her, he was marrying her for immigration reasons; and that she had already attempted to advise officials prior to 2013 she was a victim of marriage fraud.

[40] There was nothing in his first wife's testimony that she did not learn first-hand from her experiences with the Applicant. Officer B did share with her any particularly new information when he informed her of what Xhuljana said in her interview. As for the Applicant's evidence, even after she had asked him to leave, they were on speaking terms and she knew he had a common law wife, so I do not see how anything else could shock or influence her not to be an independent witness as I think she had lived through all the horror of it already.

[41] And finally, the Applicant was cross-examined by counsel at the ID hearing. At the Judicial Review hearing the Applicant's counsel argued that they did not know at the ID hearing that the first wife had been told what Xhuljana said in her interview. As a result the Applicant put forward that, not being given a chance at the IAD hearing to question the first wife about the conversations with Officer B, is a breach of procedural fairness.

[42] But the fact is that counsel did question the first wife at the ID hearing and chose not to ask her about exactly what Officer B told her. Counsel cannot now complain that, because he did not ask her at the ID level, he should be able to have her cross-examined at the IAD hearing when the IAD member said the only determinative issue was the son. The Applicant's counsel

knew the first wife had spoken to officials as it was in CAIPS notes etc. and knew she was being called and in fact cross-examined her at the ID. So it is a stretch to say that the Applicant would not have surmised that the discussion with Officer B would be around the second wife and child given it was to investigate whether the first wife was complicit in the marriage fraud. Counsel should have and could have asked those questions when she was a witness. Counsel had the opportunity and did not take it. Once the conversation was confirmed after the IAD hearing does not add to the fact she could have been asked at the ID hearing.

[43] In any case, I agree that there was nothing procedurally unfair about Officer B inquiring with the Applicant's first wife about what she knew: this appears to be an essential and unavoidable step. I agree with the IAD that the *Privacy Act* appears outside of their jurisdiction and in any case I do not find there was any *Privacy Act* breach on the information before the Court as Officer B was fulfilling his duty by attempting to figure out if the Applicant's first wife was complicit in immigration fraud.

B. Issue three: Were the IAD's findings that the Applicant was not credible and entered into a bad faith relationship unreasonable?

[44] In the written submissions, the Applicant submits it was unreasonable to find he was not credible about having a sincere relationship with his first wife because there are actions which show otherwise. These actions he alleges were that:

- he did not pick up the papers in December, 2003;
- because he was confused by his feelings;

- she is the one who re-initiated contact after the cancellation of the first sponsorship;
- she ended their relationship;
- he did not seek a property settlement;
- she and the Applicant kept in touch;
- the Applicant did not immediately apply to bring his wife over after the relationship ended;
- the Applicant and his ex-wife appeared to see each other socially on rare occasions; and
- the Applicant did odd jobs for the ex-wife.

[45] What I see is that the Applicant is asking the Court for a re-weighing of the factors when all of those facts were considered and dismissed. It was reasonable that the decision- maker preferred the story that the Applicant did not pick up the papers because he was hiding in Greece as well as accepting that his ex-wife's re-initiation of contact could be caused by many things. Some of the noted reasons were that she ended the relationship because he was abusive as well as having a property prenuptial agreement and so the Applicant had no ability to seek settlement. Other reasons to accept her story were that she kept in touch to receive the divorce papers from him that he would not produce and that the Applicant was not employed until 2011 and might not have had means to sponsor his new wife before that. Additionally, the Applicant and his ex-wife saw each other only three times and there was animosity and she said that she saw him to get him to do small jobs as she did not want to be on the hook for him if he did not work as she had sponsored him.

[46] None of this information about bad faith relationships is really relevant outside of credibility which can be determined based on other facts. The factors which were all clearly considered not at the IAD, but at the ID, and quite reasonably do not amount to a reviewable error.

C. *Issue Four: Were the RAD's findings unreasonable because the H & C factors were assessed through a "prism" of the Applicant's inadmissibility?*

[47] The Applicant submits this decision is similar to that in *Sultana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 533 and *Gan v Canada (Minister of Citizenship and Immigration)*, 2014 FC 824, where the positive factors were analyzed "through the prism" of the Applicant's conduct. The Member mentioned the Applicant's deception when weighing the factor of whether he has remorse. The Applicant submits that there was no reason for the Member to find that his remorse was not honest at the ID hearing.

[48] In *Sultana*, the Member discounted the positive factors by constantly mentioning that they were caused by the applicant's withholding of information.

[49] A simple read of this decision shows that this is entirely different from *Sultana*. The Applicant's conduct is not mentioned with regards to establishment, best interests of the child or hardship. The only mention of the conduct the H & C is where the Applicant's credibility was relevant. The mention was that the Member did not think his remorse was sincere, and thus this weighed against him. That is not a "prism": indeed, considering credibility is the only way to make a decision on whether someone's remorse is genuine. The IAD said "The panel finds that

the Appellant has many opportunities to tell the truth to Canadian officials over the years but he has chosen not to." This is supportive of someone not having remorse. In any event I find that the Member's reason for finding the Applicant dishonest is very reasonable.

[50] No certified question was offered and none arose.

JUDGMENT IN IMM-694-19

THIS COURT'S JUDGMENT is that:

1) The application is dismissed.

2) No question is certified

"Glennys L. McVeigh"
Judge

APPENDIX "A"

Immigration and Refugee Protection Act, SC 2001, c 27

Misrepresentation

40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation

(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;

Appeal allowed

67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

(a) the decision appealed is wrong in law or fact or mixed law and fact;

(b) a principle of natural justice has not been observed; or

(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

Effect

(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.

Removal order stayed

68 (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

Immigration and Refugee Protection Regulations, SOR/2002-227

Bad faith

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

Privacy Act, RSC, 1985, c P-21

Use of personal information

7 Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except

> **(a)** for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	PRETASHI v. MPSEP
PLACE OF HEARING:	CALGARY, ALBERTA
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Galina Bining Department of Justice	FOR THE RESPONDENT