Federal Court Cour fédérale

Date: 20200204

Docket: IMM-466-19

Citation: 2020 FC 194

Ottawa, Ontario, February 4, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

OLUFUNKE ADUKE OGUNSEITAN AND WAHEED OBAFEMI OLOPADE

Respondents

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada [IAD], dated December 14, 2018 [Decision],

allowing the Respondents' appeal of an Immigration Officer's decision to deny the Respondents' sponsorship application.

II. BACKGROUND

[2] The Respondents are citizens of Nigeria. Ms. Ogunseitan arrived in Canada in 2003, and applied for refugee protection based on her sexual orientation, identifying herself as a lesbian. In her refugee claim, she stated that she had never been married, had never been interested in men, and was fleeing Nigeria because her family was forcing her to marry a man against her will after discovering her sexual orientation. Her refugee claim was ultimately denied as the decision-maker found that her forced marriage allegations were not credible, despite believing she was a lesbian.

[3] On May 17, 2004, Ms. Ogunseitan applied for permanent residence on humanitarian and compassionate [H&C] grounds and then made a further application for a Pre-Removal Risk Assessment in November 2010. In these applications, she once again declared that she had never been married and stated that she feared persecution in Nigeria as a lesbian. In May 2012, her H&C application was approved and she subsequently became a permanent resident of Canada on January 9, 2013.

[4] However, prior to being granted permanent residency, Ms. Ogunseitan was introduced to Mr. Olopade in 2011 by a mutual friend. Ms. Ogunseitan's testimony reveals that this relationship with Mr. Olopade was purely platonic at first but eventually evolved into a romantic

relationship in April 2013, shortly after Ms. Ogunseitan became a permanent resident of Canada. The Respondents married on June 14, 2014.

[5] On February 2, 2015, Ms. Ogunseitan applied to sponsor Mr. Olopade, and his dependant children, for permanent residence as members of the family class. In this application, Ms. Ogunseitan once again declared that she had never been married.

[6] Upon reviewing the Respondents' sponsorship application, the Immigration Officer noted concerns with respect to the genuineness of the marriage and the legal status of one of Mr. Olopade's children, which Mr. Olopade claimed to have legally adopted. A procedural fairness letter was sent by email to Mr. Olopade in September 2015 requesting further information and documentation, including the adoption order for the child alleged to have been adopted, as well as the National Population Commission Death Certificate [NPCDC] for his previous spouse who was noted as deceased in the sponsorship application. The Respondents did not reply to the procedural fairness letter.

[7] On May 4, 2016, the Immigration Officer removed Mr. Olopade's alleged adopted daughter from the sponsorship application because she was deemed an ineligible family member. The Immigration Officer subsequently refused the Respondents' application, pursuant to s 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*], on the basis that the Respondents had not established that they were genuinely married.

[8] The Immigration Officer noted the following in his refusal decision:

1. The failure of the Respondents to reply to the procedural fairness letter;

2. The unusual and unreliable death certificate provided for Mr. Olopade's former spouse;

3. The lack of time spent together by the Respondents and the limited evidence of any communication between them;

4. The fact that Ms. Ogunseitan became a permanent resident of Canada based on her fear of returning to Nigeria, but then returned on multiple occasions to visit Mr. Olopade once she had become a permanent resident of Canada; and

5. The Respondents' failure to sufficiently demonstrate that they would live together in a spousal relationship if the application was granted.

[9] The Respondents subsequently appealed the Immigration Officer's decision to the IAD and provided a NPCDC for Mr. Olopade's former spouse, issued on the sole basis of his own affidavit.

[10] It was also discovered that Ms. Ogunseitan had been legally married from November 1996 to February 2014 to Mr. Olusola Michael Balogun, a former citizen of Nigeria who successfully sought refugee protection in Canada in 2005 on the basis that he too was homosexual. Ms. Ogunseitan's previous marriage was discovered when her ex-husband filed their divorce certificate when applying to sponsor a Nigerian woman whom he had married in 2015.

[11] The IAD heard the Respondents' appeal on September 7, 2018. At the hearing, the Applicant successfully applied to add misrepresentation, pursuant to s 40(1)(a) of the *IRPA*, as a further ground for refusal.

III. DECISION UNDER REVIEW

[12] On December 14, 2018, the IAD allowed the Respondents' appeal. The IAD found that the Respondents were able to prove, on a balance of probabilities, that their marriage was "genuine and not entered into primarily for the purpose of acquiring a status or privilege" under the *IRPA*. As such, Mr. Olopade was recognized as being a valid member of the family class and the Immigration Officer's decision refusing their sponsorship application was set aside.

A. *Misrepresentations by Ms. Ogunseitan*

[13] The IAD analyzed whether the misrepresentations on Ms. Ogunseitan's permanent residency application concerning her marital history could have induced an error in the administration of the *IRPA* in the context of the sponsorship application at issue. More specifically, the IAD considered whether the misrepresentations "irreparably tainted" Ms. Ogunseitan's credibility, as well as the credibility of the evidence presented for the purposes of this application, therefore making the Respondents inadmissible pursuant to s 40(1)(a) of the *IRPA*.

[14] Although the IAD noted that the previous misrepresentations by Ms. Ogunseitan gave rise to serious credibility concerns, it found that the Respondents were credible. This was in large part due to their clear and compelling testimonies before the IAD.

[15] The IAD stated that the issue at hand was the current sponsorship application. Therefore, "historical misrepresentations […] cannot lead directly to dismissal." Since it had been fifteen years since Ms. Ogunseitan's arrival in Canada, the IAD found that it could not speculate that the Respondents were lying with regard to their current application simply due to Ms. Ogunseitan's previous misrepresentations.

[16] The IAD noted that it remained skeptical about some of Ms. Ogunseitan's evidence and her explanation for the misrepresentations. However, it held that the misrepresentations did not irreparably taint Ms. Ogunseitan's overall credibility or the evidence most relevant to the genuineness of the marriage at issue. The IAD also noted that the misrepresentations should be analyzed according to the Sexual Orientation and Gender Identity and Expression [SOGIE] Guidelines and Directives, which recognize the diverse expressions and evolution of an individual's sexual identity.

[17] For these reasons, the IAD found that any misrepresentations by Ms. Ogunseitan concerning her marital history did not induce an error in the administration of the *IRPA*. This was because the Immigration Officer focused primarily on the motives of Mr. Olopade and the genuineness of the Respondents' marriage rather than Ms. Ogunseitan's relationship history. Though the IAD admits that questions would surely have been asked by the Immigration Officer,

it found that it was unlikely that Ms. Ogunseitan's former marriage would have had an impact on the sponsorship application at issue. As such, it found that the sponsorship application should not be dismissed due to inadmissibility for misrepresentation pursuant to s 40(1)(a) of the *IRPA*.

B. *Genuineness of the Marriage*

[18] The IAD then considered whether Mr. Olopade is a spouse for the purposes of the sponsorship application pursuant to s 4(1) of the *Regulations*. Concluding that the Respondents' testimonies were credible, the IAD found that the Immigration Officer's concerns were not well founded. First, the IAD noted that it is more probable than not that the Respondents did not receive the procedural fairness letter because Ms. Ogunseitan "presented at the hearing as a person deeply invested in seeing the appeal through" and it is therefore unlikely that she would have failed to provide information that would assist her in achieving her objective.

[19] Second, the IAD found that the Immigration Officer's notes contained inconsistencies regarding Mr. Olopade's former spouse. The IAD stated that the Immigration Officer's notes first indicated that Mr. Olopade's former wife was deceased and her death certificate was on file, but then go on to question whether she is deceased or not. In light of this contradiction, the IAD was satisfied that Mr. Olopade's former spouse is deceased and the Respondents' marriage was legally valid.

[20] Third, the IAD was satisfied that the Respondents have spent sufficient time together and have provided satisfactory evidence of their mutual communication to demonstrate the genuineness of their marriage. The IAD pointed to Ms. Ogunseitan's yearly visits to Nigeria to

spend time with Mr. Olopade and his children since 2014, as well as the evidence of electronic communication between the Respondents from March to September 2018. The IAD also noted that it was probable that the Respondents would have been able to show similar communication over a longer period had the documentary evidence gathered for filing not been lost through no fault of the Respondents.

[21] Fourth, the IAD was of the view that the evidence supported the position that the Respondents would likely live together in a spousal relationship if the application was granted. The IAD cites the Respondents' testimonies with respect to Mr. Olopade's children and their need for a mother figure, as well as the photographs of the Respondents during family gatherings.

[22] For these reasons, the IAD recognized the genuineness of the Respondents' marriage and therefore found Mr. Olopade to be a valid member of the family class.

IV. ISSUES

[23] The issues to be determined in the present matter are the following:

1. Did the IAD err in applying the legal test for misrepresentation pursuant to s 40(1)(a) of the *IRPA*?
2. Did the IAD err by not finding the Respondents inadmissible pursuant to s 40(1)(a) of the *IRPA*?
3. Did the IAD err in finding that the Respondents' marriage was genuine pursuant to s 4(1) of the *Regulations*?

V. STANDARD OF REVIEW

[24] This application was argued prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. This Court's judgment was taken under reserve. The parties' submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework. However, given the circumstances in this matter, and the Supreme Court of Canada's instructions in *Vavilov* at para 144, this Court found that it was necessary to ask the parties to make additional submissions on the standard of review. I have applied the *Vavilov* framework in my consideration of the application. Although it has changed the applicable standard to my review of whether the IAD erred in applying the test for misrepresentation pursuant to s 40(1)(a) of the *IRPA*, it has not changed my conclusion.

[25] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority did away with the contextual and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the reasonableness standard applies. However, the majority noted that this presumption can be set aside on the basis of: (1) clear legislative intent to prescribe a different standard of review (*Vavilov*, at paras 33-52); and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[26] Prior to the Supreme Court of Canada's decision in *Vavilov*, the Applicant argued that the applicable standard of review to whether the IAD erred in applying the legal test for misrepresentation pursuant to s 40(1)(a) of the *IRPA* was correctness, citing *Musabyimana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 50 at para 22 [*Musabyimana*]. The Applicant and the Respondents also appeared to agree that the reasonableness standard applied when reviewing the IAD's analysis of Ms. Ogunseitan's misrepresentations pursuant to s 40(1)(a) of the *IRPA*, as well as its analysis of the Respondents' marriage pursuant to s 4(1) of the *Regulations*.

[27] On January 16, 2020, the parties were asked to make written submissions on the applicable standard of review in light of the *Vavilov* decision. Both parties submitted that the standard of reasonableness now applies to this Court's review of all the issues in this case. In particular, the Applicant submitted that this Court should no longer review the IAD's application of the legal test for misrepresentation according to the correctness standard but rather according to the reasonableness standard, unless the Court was of the opinion that this is a question "of central importance to the legal system as a whole." Nonetheless, the Applicant submitted that, in either case, this application should be allowed.

[28] I agree with both parties that the standard of reasonableness should be applied to my review of all the issues at bar as there is nothing to rebut the presumption that the standard of reasonableness applies.

[29] In the past, courts have often found that the standard of correctness applies to questions concerning whether a decision-maker applied the correct legal test. See, for example, *Musabyimana,* at para 22. However, following the Supreme Court of Canada's decision in *Vavilov*, a decision-maker's application of a legal test does not fall into any of the listed exceptions to the presumption of reasonableness, baring a constitutional dimension to the legal question, or a generality or "central importance to the legal system as a whole." However, clear language in a governing statutory scheme and a significant body of jurisprudence establishing a certain applicable legal test will impose strict constraints on a decision-maker's discretion, and a departure from such would generally be considered unreasonable in the absence of explicit persuasive reasons for this departure. See *Vavilov,* at paras 105-114, 129-132, notably para 111:

> [111] It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: see *Dunsmuir*, at paras. 47 and 74. For example, an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers: see *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at paras. 45-48. Neither can a body instructed by legislation to determine what tax rate is applicable in accordance with an existing tax system ignore that system and base its determination on a "fictitious" system it has arbitrarily created: *Montréal (City)*, at para. 40. Where a relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties' rights within that relationship: *Dunsmuir*, at para. 74. Similarly, where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding of that standard: see, e.g., the discussion of "reasonable grounds to suspect" in *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006, at paras. 93-98.

[30] As for this Court's review of the remaining questions, the application of the standard of reasonableness to these issues is also consistent with the existing jurisprudence prior to the Supreme Court of Canada's decision in *Vavilov*. See, for example, *Pretashi v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1105 at para 26 and *Basanti v Canada (Citizenship and Immigration)*, 2019 FC 1068 at para 13.

[31] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with whether it "bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para 99). Reasonableness is a single standard of review that varies and "takes its colour from the context" (*Vavilov*, at para 89 citing *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). These contextual constraints "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (*Vavilov*, at para 90). Put in another way, the Court should intervene only when "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, at para 100). The Supreme Court of Canada lists two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal to the decision-maker's reasoning process; and (2) untenability "in light of the relevant factual and legal constraints that bear on it" (*Vavilov*, at para 101).

VI. STATUTORY PROVISIONS

[32] The following statutory provisions of the *IRPA* are relevant to this application for judicial review:

Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	40 (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(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;	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi ;
(b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;	b) être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations ;
(c) on a final determination to vacate a decision to allow their claim for refugee protection or application for protection; or	c) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile ou de protection ;
(d) on ceasing to be a citizen under	d) la perte de la citoyenneté :
(i) paragraph 10 (1) (a) of the *Citizenship Act*, as it read immediately before the coming into force of section 8 of the *Strengthening Canadian Citizenship Act*, in the circumstances set out in subsection 10 (2) of the	(i) soit au titre de l'alinéa 10 (1) a) de la *Loi sur la citoyenneté*, dans sa version antérieure à l'entrée en vigueur de l'article 8 de la *Loi renforçant la citoyenneté canadienne*, dans le cas visé au paragraphe 10 (2) de la

Citizenship Act, as it read immediately before that coming into force,	*Loi sur la citoyenneté*, dans sa version antérieure à cette entrée en vigueur,
(ii) subsection 10 (1) of the *Citizenship Act*, in the circumstances set out in section 10.2 of that Act, or	(ii) soit au titre du paragraphe 10 (1) de la *Loi sur la citoyenneté*, dans le cas visé à l'article 10.2 de cette loi,
(iii) subsection 10.1 (3) of the *Citizenship Act*, in the circumstances set out in section 10.2 of that Act.	(iii) soit au titre du paragraphe 10.1 (3) de la *Loi sur la citoyenneté*, dans le cas visé à l'article 10.2 de cette loi.

[33] The following provision of the *Regulations* is relevant to this application for judicial review:

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

VII. ARGUMENT

A. *Applicant*

[34] The Applicant argues that this judicial review should be allowed due to: (1) the IAD's failure to apply the proper legal test when analyzing inadmissibility due to misrepresentations prescribed under s 40(1) of the *IRPA*; (2) the IAD's unreasonable analysis of the misrepresentations at issue; and (3) the IAD's unreasonable analysis of the genuineness of the Respondents' marriage.

(1) Application of the Legal Test for Misrepresentation

[35] The Applicant argues that the IAD only applied half of the test required by s 40(1) of the *IRPA* when analyzing inadmissibility due to misrepresentations. The Applicant says that, s 40(1) of the *IRPA* requires a decision-maker to analyze whether a misrepresentation induced, or could have induced, an error in the administration of the *IRPA*. This is confirmed in *Geng v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1155 at para 33 [*Geng*]. Yet, the Applicant notes that, in this case, the IAD only focused its analysis on whether the misrepresentations induced an error in the administration of the *IRPA* and not whether it could have done so.

[36] Although the Applicant admits that the IAD set out the proper legal test at the beginning of para 13 of its Decision, the IAD's analysis only looked at whether the misrepresentations induced an error. The Applicant points specifically to para 28 of the Decision where the IAD

states that it was "not satisfied that the Applicant's lack of forthrightness in the sponsorship application regarding her past marriage or lesbian relationships induced an error in the administration" of the *IRPA*, while admitting that "it cannot be said that no questions would have been asked" if Ms. Ogunseitan's relationship history had been properly disclosed.

[37] For the Applicant, the IAD's statement to the effect that questions would have been asked if the misrepresentations had not been made indicates that the IAD did not analyze whether the misrepresentations could have induced an error. This Court has made it clear that, in cases where the misrepresentations in question makes an error possible, or would have provoked further inquiries, there are sufficient grounds to justify inadmissibility due to misrepresentation (*Geng*, above, at para 33 as well as *Li v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 87 at paras 13-18 [*Li*]).

[38] As such, since the IAD did not apply the correct legal test for inadmissibility due to misrepresentation under s 40 of the *IRPA*, the Applicant argues that this alone justifies allowing this application for judicial review.

(2) Reasonableness of Misrepresentation Analysis

[39] The Applicant also argues that the IAD's analysis of Ms. Ogunseitan's misrepresentations was unreasonable because the IAD limited the scope of its analysis to the current sponsorship application and, in any case, did not properly contextualize the misrepresentations when determining their materiality to the current application.

[40] The Applicant notes that the materiality of a misrepresentation is not limited to a specific point in the application process and must be considered according to the context at the time of the misrepresentation (*Patel v Canada (Citizenship and Immigration)*, 2017 FC 401 at para 77 [*Patel*]; *Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153 at para 38 [*Kazzi*]).

[41] In this case, the Applicant argues that the IAD was required to consider whether the misrepresentations could have induced an error in the determination of Ms. Ogunseitan's application for permanent residency, which was granted on H&C grounds based in large part on her fear of returning to Nigeria as a lesbian. The fact that Ms. Ogunseitan was still married to a man at the time her application for permanent residence is directly at odds with the evidence submitted stating that she was a lesbian who had never been married or had any interest in men. The Applicant argues that this narrow analysis of inadmissibility due to misrepresentation is unreasonable.

[42] Moreover, the Applicant argues that even if this narrow scope of the misrepresentation analysis is accepted, the IAD unreasonably failed to consider how the past misrepresentations are material to the current sponsorship application. The Applicant argues that it was unreasonable for the IAD to ignore the fact that the misrepresentations were important enough to affect the overall process; Ms. Ogunseitan would not have been able to sponsor Mr. Olopade if she had not received her permanent residency status. This Court has stated that a misrepresentation need not be determinative to be material (*Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 at para 28). Consequently, since the withheld information would still have likely led to further investigation or questions, the misrepresentations in this case were material.

[43] The Applicant also argues that it was unreasonable for the IAD to determine whether the misrepresentations induced an error in the application of the *IRPA* by simply referring to the notes of the Immigration Officer. This is because the Immigration Officer was not aware of the information withheld by Ms. Ogunseitan.

(3) Genuineness of the Respondents' Marriage

[44] Finally, the Applicant argues that the IAD unreasonably assessed the genuineness of the Respondents' marriage by erroneously: (1) finding a contradiction in the Immigration Officer's notes concerning Mr. Olopade's former spouse's death certificate; (2) assigning positive weight to the NPCDC provided by Mr. Olopade without referring to the Applicant's concerns; and (3) finding that the Respondents did not receive the procedural fairness letter.

[45] The Applicant states that a careful review of the evidence shows that there is no contradiction in the Immigration Officer's notes. The Immigration Officer first indicated that he received a death certificate from the Respondents, and subsequently sent a procedural fairness letter specifically asking for a NPCDC. Finally, he concluded that the death certificate originally provided was "not the usual death certificate seen and is not a state issued certificate." The Applicant argues that the notes show the evolution of the Immigration Officer's concerns regarding the credibility of the death certificate rather than an inconsistency.

[46] The Applicant also argues that it was unreasonable for the IAD to assign positive weight to the NPCDC without addressing the Applicant's concerns relating to its authenticity. In this case, the Applicant's concerns derived from the fact that the NPCDC was issued shortly after the

application was refused, was based solely on Mr. Olopade's affidavit, and the fact that non-genuine information can easily be obtained in Nigeria. Therefore, the Applicant states that it was unreasonable for the IAD to ignore these important concerns when assigning weight to the NPCDC.

[47] Finally, the Applicant states that the evidence does not support the IAD's finding that the Respondents did not receive the procedural fairness letter. This is because the Respondents took steps to obtain a NPCDC on July 12, 2016, immediately following the rejection of the sponsorship application by the Immigration Officer on May 4, 2016. The Applicant submits that if the Respondents had not received the procedural fairness letter, they would not have known that this document was required until nearly a year later (March 2017) when the Immigration Officer's notes were produced in the IAD appeal record.

B. *Respondents*

[48] The Respondents argue that: (1) an assessment of the entire Decision reveals that the IAD analyzed whether the misrepresentations could have induced an error in the application of the *IRPA*; (2) Ms. Ogunseitan did not misrepresent her marital history and, in any case, her marital history is not material since the basis of her claim was her sexual orientation and not her marital status; and (3) the IAD's assessment of the Respondents' marriage was reasonable given the evidence before the decision-maker.

(1) Application of the Legal Test for Misrepresentation

[49] The Respondents argue that, if one reviews the IAD's Decision as a whole, it is clear that the IAD applied the full legal test prescribed by s 40(1) of the *IRPA* when assessing inadmissibility due to misrepresentation. The Respondents specifically point to paras 26-28 of the Decision as well as para 13 which states as follows:

> […] I find the [Respondents'] misrepresentations did not induce an error in the analysis of the marriage sponsorship application and consideration of 4(1) of the Regulations. Speaking generally, although the [Respondents'] apparent misrepresentations should not be endorsed or rewarded, they are not fatal to this appeal.

(2) Reasonableness of Misrepresentation Analysis

[50] The Respondents first argue that Ms. Ogunseitan did not misrepresent her marital history when stating that she was never married because: (1) Ms. Ogunseitan is considered to have never been married under Nigerian customary laws due to the returning of the "Bride Price"; (2) the refugee, permanent residency, and H&C forms asked for Ms. Ogunseitan's current marital status; and (3) Statistics Canada defines "single" as a person who has never been married, or a person whose marriage has been annulled and has never subsequently remarried. Accordingly, the Respondents argue that Ms. Ogunseitan did not misrepresent her marital history as she was "technically right" and therefore cannot be considered inadmissible due to misrepresentation.

[51] In any case, the Respondents argue that should this Court find that Ms. Ogunseitan misrepresented her marital history, such misrepresentations are not material. The Respondents say that Ms. Ogunseitan's permanent residency application was grounded in her fear of being

persecuted and imprisoned in Nigeria on account of her sexual orientation and not her marital status. Ms. Ogunseitan's marital history was, therefore, not relevant to her permanent residency application unless an "outdated or untrue stereotyping of LGBTQ+ people" is applied.

[52] The Respondents note that the IAD was correct in not pigeonholing Ms. Ogunseitan's sexual orientation. They state that this was consistent with the SOGIE Guidelines and Directives, which warn adjudicators to be aware of the fact that not all LGBTQ+ persons "share the same dynamics and characteristics across cultures." As such, the Respondents say the IAD's analysis of the misrepresentations is reasonable since Ms. Ogunseitan's former husband in no way invalidates her claim as a member of the LGBTQ+ community.

[53] To support this argument, the Respondents cite this Court's statement in *Lipdjio v Canada (Citizenship and Immigration)*, 2011 FC 28 at para 18, which notes that homosexuality is "neither verifiable nor quantifiable," as well as the IAD's decision in *Mizoji v Canada (Citizenship and Immigration)*, (2015) File No TB3-03790 at para 16 (CA IRB) which concludes that the "fact that someone has been in a same-sex relationship does not preclude a genuine heterosexual relationship at a later point, and vice versa."

(3) Genuineness of the Respondents' Marriage

[54] Finally, the Respondents argue that the IAD's analysis of the genuineness of their marriage was reasonable. They point out that, as stated by the IAD, the Immigration Officer's notes are contradictory with respect to the death certificate. They also argue that it was

reasonable for the IAD not to have explicitly analyzed the Applicant's concerns relating to the NPCDC, as there was no evidence before the IAD supporting these concerns.

[55] Moreover, the Respondents state that the IAD's finding that the Respondents did not receive the procedural fairness letter was reasonable since the letter was sent to Mr. Olopade's email address rather than Ms. Ogunseitan's email address, the latter being the one listed in the application. The Respondents admit that they became aware of the letter once their application was refused which subsequently prompted them to obtain the NPCDC.

C. *Applicant's Reply*

[56] In reply, the Applicant states that there is no evidence that Ms. Ogunseitan's former marriage was annulled. Rather, the fact that she required a divorce in 2014 is proof that she was still legally married when she claimed to have never been married. Furthermore, the Applicant argues that expert evidence is required in order to rely on foreign customary law (*Xiao v Canada (Minister of Citizenship and Immigration)*, 2009 FC 195 at paras 24-25). As such, the Respondents' argument that Ms. Ogunseitan's statements were "technically right," is not valid.

[57] The Applicant also justifies the Immigration Officer's decision to send the procedural fairness letter to Mr. Olopade's email address as the documents required pertained to the death of his previous spouse, a document that would have been in his possession.

VIII. ANALYSIS

A. *Introduction*

[58] I accept the Applicant's assertions that this matter must be quashed and returned for reconsideration by a differently constituted IAD. The Decision at issue is entirely unreasonable.

B. *Preliminary Certified Tribunal Record Issue*

[59] For reasons that are not entirely clear, the Certified Tribunal Record [CTR] provided by the IAD in this case contained only a copy of the Decision and the relevant transcripts. The IAD said that it was unable to locate the original case file that included the complete record.

[60] Notwithstanding a deficient CTR from the IAD, I conclude that I am still able to hear this application on its merits because the documentation needed for me to do so is available to the Court in the Applicant's Record. In other words, the documentation required to adjudicate this application is available to the Court for review. See *Patel*, above, at para 30 and *Aryaie v Canada (Citizenship and Immigration)*, 2013 FC 469 at paras 19-29. Counsel for both the Applicant and the Respondents agree with this conclusion.

C. *Application of Test for Misrepresentation*

[61] It is clear that the IAD applied a legal test for misrepresentation that unreasonably departs from the one set out in s 40(1)(a) and confirmed over the years in the jurisprudence. The IAD

does not justify a departure from this legal test in its Decision. The IAD's approach to the misrepresentation issue is, in essence, contained in the following paragraphs of the Decision:

> [13] While there is some evidence indicating the Appellant may have misrepresented or withheld material facts on her permanent residency application, the issue before me is whether those misrepresentations could have induced an error in the administration of the Act for the purposes of her sponsorship application which is the subject of this appeal. Viewing this evidence through the narrow lens of the IAD in this marriage sponsorship appeal, I find the Appellant's misrepresentations did not induce an error in the analysis of the marriage sponsorship application and consideration of 4(1) of the Regulations. Speaking generally, although the Appellant's apparent misrepresentations should not be endorsed or rewarded, they are not fatal to this appeal.
>
> …
>
> [22] The most troubling aspect of this appeal arises from the Appellant's involvement with Canadian immigration officials and processes well before she met the Applicant. Minister's counsel submits that the Appellant made significant material misrepresentations to immigration officials in the past to gain status in Canada and these misrepresentations weigh heavily against her credibility in this matter. I have some sympathy for this argument and have considered it carefully.
>
> [23] The Refugee Division rejected the Appellant's request for refugee protection in 2003, at least in part, due to concerns about her credibility. The panel found some of the Appellant's testimony to be contradictory, implausible, self-serving and contrived. This assessment does not inspire confidence in the Appellant's veracity. Nevertheless, the decision in this appeal must be based on evidence about circumstances which have occurred 15 years after the Appellant's arrival in Canada. Much has changed and happened in her life since then. Historical misrepresentations by the Appellant, even if conclusively proven in this appeal, cannot lead directly to dismissal.
>
> [24] I must be satisfied that the Appellant has provided credible and reliable evidence to support allowing this appeal. If her evidence is not credible, then it is insufficient and the appeal must fail. That said, speculating the Appellant is misleading this panel because she may have endeavored to mislead the Refugee Division is not, in and of itself, determinative. While the Appellant may

> have provided untruthful information to immigration officials in the past, the evidence in this appeal does not lead to the conclusion she is doing so now. On the contrary, the totality of the evidence leads to a reasonable inference that the Appellant has fallen in love with the Applicant and she wants to mother his children. Further, the Applicant also appears to be emotionally connected to the Appellant and wishes to move to Canada to live as a family.
>
> …
>
> [28] Further, I am not satisfied that Appellant's lack of forthrightness in this sponsorship application regarding her past marriage or lesbian relationships induced an error in the administration of the Act. The visa officer in this case focused primarily on the Applicant's motives and the genuineness of the relationship, with the Appellant's relationship history figuring much less prominently. While it cannot be said that no questions would have been asked, it is unlikely information about the Appellant's past relationship history would have had an impact on the sponsorship application. Based on the evidence before me in relation to this marriage sponsorship appeal, I find the Applicant is not inadmissible pursuant to s.40 (1)(a) of the Act.

[62] The IAD's approach to the misrepresentation issue in this Decision is categorically unreasonable given the important legal constraints on its discretion. While the IAD, in para 13, says that the issue is whether Ms. Ogunseitan's misrepresentations "could have induced an error," the analysis only deals with the issue of whether those representations actually induced an error "in the analysis of the marriage sponsorship application and consideration of 4(1) of the Regulations."

[63] This means that the IAD failed to consider whether Ms. Ogunseitan's misrepresentations "could have" induced an error. This does not accord with the jurisprudence of this Court to the effect that the possibility of an error, or the foreclosure of further inquiries, is a basis for inadmissibility. See *Geng* at para 33 and *Li* at paras 13-18, both above. Respondents' counsel

relies upon the wording of para 28 of the Decision which he says shows that the IAD did apply and consider the "could have" aspect of the test, but my reading of para 28 leads me to conclude that it contains no wording that could support such a reading.

[64] The IAD was clearly aware that Ms. Ogunseitan "may have provided untruthful information to immigration officials in the past," but failed to consider the possible ramifications of this and whether further inquiries could have been necessary. In other words, the IAD failed to consider the materiality of the misrepresentations at the time they were made.

[65] The materiality of a misrepresentation is not limited to any specific time in the application process. As such, the assessment of whether the misrepresentations could have induced an error in the administration of the *IRPA* must be considered in the context of when the misrepresentations were made. See *Patel* at para 77 and *Kazzi* at para 38, both above.

[66] This error in itself is sufficiently material to require the matter to be returned for reconsideration without the need for further review of the Decision.

[67] Counsel for the Respondents has also argued before me that any misrepresentations that Ms. Ogunseitan may have made about her first marriage were entirely innocent and non-material so that the IAD did not need to consider them in its Decision. This is not an issue for me to address in this application because it is for the IAD to consider and determine whether the misrepresentations should affect the decision it has to make regarding the genuineness of the Respondents' marriage. Nor am I deciding in this application for judicial review that the

marriage between the Respondents is not genuine. The issue before me is simply whether this matter should be returned to the IAD for reconsideration as a result of reviewable errors in the Decision. However, I think it is worth pointing out that when assessing Ms. Ogunseitan's refugee claim, the RPD, in its decision of October 17, 2003, found Ms. Ogunseitan's evidence about forced marriage to be "contradictory, implausible and self-serving" and concluded that her claim of forced marriage was not credible and rejected "the claimant's evidence of such an event ever having been scheduled or capable of taking place, even if her opposition to it were real." The RPD decision has not been challenged. Clearly, then, Ms. Ogunseitan's past conduct suggests that her continuing denial that she was ever previously married in her past applications needs to be examined by the IAD in accordance with the misrepresentations provisions of the *IRPA*, the *Regulations*, and the governing jurisprudence to determine whether she is entitled to sponsor Mr. Olopade.

D. *Other Errors*

[68] In order to assist the reconstituted IAD to reconsider this matter fully, I also draw attention to the following possible errors in the present Decision:

1. The misrepresentation analysis is also unreasonable because it is limited to the sponsorship application, and it does not consider whether past misrepresentations in previous applications for protection and permanent residence could have induced an error. For example, if Ms. Ogunseitan had not acquired permanent residence following her successful H&C application, she could not have been able to sponsor Mr. Olopade;

2. It made no sense in this case for the IAD to say that the misrepresentations were not material because the Immigration Officer did not comment on them when, on the facts of this case, the existence of potential misrepresentations was unknown until after the Immigration Officer had made a decision and the appeal to the IAD had been commenced;

3. My review of the record before me indicates no "inconsistencies which perpetuate misunderstandings," as to Mr. Olopade's marital status at the time he married Ms. Ogunseitan. The Immigration Officer's notes show that he had concerns about the documentation provided by Mr. Olopade and then reasonably concluded that the documentation was insufficient to establish that Mr. Olopade's previous spouse was deceased;

4. The evidence appears to show that the procedural fairness letter was sent to Mr. Olopade and the evidence supports that he received it; and

5. The IAD did not address the concerns raised regarding the authenticity of the NPCDC obtained by Mr. Olopade on July 12, 2016, for his former spouse.

[69] I am not deciding these matters here because there is no need to, and I merely mention them, in *obiter*, to alert the IAD that, on the record before me, the possible errors were significant matters of concern that should be addressed in full.

[70] Counsel agree there are no questions for certification and the Court concurs.

JUDGMENT IN IMM-466-19

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted IAD in accordance with these reasons.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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