

Federal Court



Cour fédérale

Date: 20200325

Docket: IMM-3795-19

Citation: 2020 FC 421

Ottawa, Ontario, March 25, 2020

PRESENT: Mr. Justice Pentney

BETWEEN:

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Applicant

and

PRUDENCE MBANDJOCK

Respondent

JUDGMENT AND REASONS

[1] Prudence Mbandjock's husband, Christopher Ndukwe Muotoh, a citizen of Nigeria, applied for permanent residence in Canada as her spouse. His application was denied by a visa officer. Prudence Mbandjock, the Respondent, appealed this decision to the Immigration Appeal Division (IAD), which overturned the visa officer's decision because it found that the marriage was valid. The Minister of Citizenship and Immigration seeks judicial review of this decision.

[2] The only issue in this case is whether the IAD's assessment of the couple's intention in entering into the marriage was reasonable. The standard of review is reasonableness (*Pabla v*

Canada (Citizenship and Immigration), 2018 FC 1141 at paras 10-13; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

[3] In *Vavilov*, the Supreme Court of Canada emphasized that reasonableness review involves a “sensitive and respectful, but robust, evaluation of administrative decisions” (at para 12), and that it is an “approach meant to ensure that courts intervene in administrative matters only when it is truly necessary to do so in order to safeguard the legality, rationality and administrative fairness of the administrative process” (at para 13). Where, as here, the decision-maker is required to provide reasons for the decision, the focus is on the reasons, examined with due regard to the context of the administrative decision, but also taking into account the impact of the decision on the person affected. One overarching objective of this approach is to seek to reinforce a “culture of justification in administrative decision making” (at para 2).

[4] The core elements of reasonableness review under the *Vavilov* framework were summarized by the Supreme Court of Canada in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*]:

[31] A reasonable decision is “one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review “[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with ‘respectful attention’ and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion” (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand “the basis on which a decision was made” (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).

[5] The analysis of the justification, reasonableness, and transparency of the IAD's decision begins with the legal framework, and then considers the relevant factual matrix for the decision. A reviewing court must also examine the internal logic of the reasoning process. One way of considering the overall question is to ask the simple question: does it "add up" in light of the facts and the law that set the parameters for the decision (*Vavilov* at para 104)?

[6] The parties agree that this case hinges on the interpretation, and application, of subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*]:

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.

Mauvaise foi

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) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;

b) n'est pas authentique.

[7] In order to qualify for permanent residence in Canada as a spouse or common-law partner of a Canadian citizen, it must be determined that the relationship meets the requirements set out in subsection 4(1) of the *Regulations*. This version of subsection 4(1) came into force on September 30, 2010, and it replaced a version that read as follows:

Bad faith

4 For the purposes of these Regulations, a foreign national shall not be considered a

Mauvaise foi

4 Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant

<p>spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.</p>	<p>l'époux, le conjoint de fait, le partenaire conjugal ou l'enfant adoptif d'une personne si le mariage, la relation des conjoints de fait ou des partenaires conjugaux ou l'adoption n'est pas authentique et vise principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi.</p>
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[8] The material change in the provision is that the test has changed from one that is conjunctive to one that is disjunctive. In plain language, this means that under the old test, in order to disqualify a marriage, it had to be both not genuine and entered into to gain an immigration status. In practice this meant that a marriage that appeared to have been entered into for the purpose of gaining an immigration status could nevertheless be found to be valid if the evidence showed that it had evolved into a genuine marital relationship (see, for example: *Donkor v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1089 at paras 12-13; *Singh v Canada (Citizenship and Immigration)*, 2014 FC 1077 at para 7).

[9] The new test set out in the current version of the *Regulations* requires two separate assessments that take account of two different time periods. This means that an officer, or the IAD, must examine: (i) whether the marriage was entered into for the purpose of gaining an immigration status – which is to be assessed at the time of the marriage; and (ii) whether the marriage is genuine – which is to be assessed at the time of the decision. It is no longer possible for an “invalid” marriage to become valid through the passage of time and the evolution of the relationship (see *Canada (Citizenship and Immigration) v Moise*, 2017 FC 1004 at paras 15-16 [*Moise*]; *Trieu v Canada (Citizenship and Immigration)*, 2017 FC 925 at para 36 [*Trieu*]).

[10] The key question raised in this case is whether the IAD properly applied the current requirements set out in the provision, or whether it mistakenly followed the previous test.

[11] The IAD decision begins by stating the main issue in the case is whether subsection 4(1) of the *Regulations* applies. It notes that this involves the question whether the Respondent “has established, on a balance of probabilities, that the relationship is genuine and that it was not entered into primarily for the purpose of acquiring any status under the Act.” The decision then analyzes the questions in that order.

[12] On the genuineness of the marriage, the IAD applied the factors generally recognized in the case law (citing *Chavez v Canada (Citizenship and Immigration)* (IAD TA3-244009), Hoare, January 17, 2005). It found that the couple had known each other for 17 years, and had been married for 10 years; they had cohabited for about one year, and then had spent time together in the intervening period after the husband left Canada. The evidence showed five trips between 2011 and 2016 during which they had spent time together in Cameroon.

[13] In regard to the behaviour of the parties, the IAD noted that they chose their wedding date with care, because it held special meaning for both of them – it was on the same day as the Respondent’s late father was born, and was close to the day when they first met. They also arranged a second marriage ceremony in Nigeria in order to be able to celebrate the occasion with family and friends, something that had not been possible when they were married in Montreal. The IAD also considered evidence about the evolution of their relationship, including testimony from two friends of the Respondent. The IAD noted that the couple had purchased land in Nigeria to build a house for their old age.

[14] The IAD referred to the couple's knowledge of each other, and concluded that despite certain contradictions in their evidence, they had demonstrated an excellent knowledge of each other and their respective families. The panel also noted the ongoing level of communication between the couple, as well as their financial relationship.

[15] Based on its assessment of all of these considerations, the IAD concluded that the couple had offered "persuasive testimonial and documentary evidence that supports the genuineness of their relationship." It then turned to a consideration of whether the primary purpose for entering into the marriage was to acquire a status or privilege under the Act.

[16] To begin, the IAD noted the jurisprudence of this Court to the effect that the lack of genuineness of a marriage is strong evidence that it was entered into for the purpose of gaining status. The IAD stated that the opposite conclusion must be equally true – that the genuineness of a marriage is strong evidence that it was not entered into for the purpose of gaining status. It noted that the analysis must consider the "primary" purpose of the marriage.

[17] On this point, the IAD considered the arguments of the Applicant, and these will not be summarized at length here because they are dealt with below. The IAD found that the evidence about the husband's efforts to stay in Canada, the end of his previous marriage after his former wife withdrew her sponsorship of him, and his applications for permanent residence as well as a tourist visa, did not suffice to establish that the primary purpose of the marriage was to obtain status under the Act.

[18] On this basis, the IAD granted the Respondent's appeal and found that the marriage met the criteria set out in subsection 4(1) of the *Regulations*.

[19] The Applicant argues that the IAD conflated the two prongs of the test, and improperly attributed the evidence as to the genuineness of the relationship to the couple's prior intention at the time of entering into the marriage. The Applicant contends that because of this error, the IAD failed to consider the evidence that called into question the motivation of the husband for entering into the marriage, specifically the timing of the certain key events in light of his immigration history. The Applicant points to the structure and wording of the decision in support of its argument, and to the fact that all of the jurisprudence relied on by the IAD pre-dates the change in the *Regulations*.

[20] The Respondent submits that the IAD correctly stated and applied the test, and that it was entitled to consider the relationship between the two elements of the test. The jurisprudence relied on by the IAD remains valid today insofar as it relates to the factors that are relevant to assessing the genuineness of a marriage and to the relationship between the two branches of the test. The Respondent contends that the reasons must be read as a whole, in light of the record, and that doing so confirms that the IAD's decision is reasonable.

[21] I agree with the argument of the Applicant.

[22] At the outset, it is important to recall that the standard of reasonableness review explained in *Vavilov* seeks to "affirm the need to develop and strengthen a culture of justification in administrative decision-making" (at para 2). One aspect of this is that the focus of the review

in a case such as this is on the reasons given by the decision-maker, because of “the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it” (*Vavilov* at para 95). The Supreme Court explained one implication of this in the following passage, which is particularly apt in this case:

[96] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion.

[23] Turning back to the case at bar, I find that the IAD decision is not transparent and intelligible because it fails to explain how it assessed the evidence against the legally relevant tests, in particular in relation to the first branch of the test, regarding the intention at the time of marriage, set out in paragraph 4(1)(a) of the *Regulations*. I agree with the Respondent that the IAD appears to have stated the test properly early in its decision. The difficulty, however, is with the application of the test in light of the evidence in the record.

[24] The IAD decision begins with an analysis of the evidence on the factors relevant to the genuineness of the marriage, including the length of the relationship and the time the couple spent together, the behaviour of the parties, their knowledge of each other and continuing communication, as well as their financial situation. All of these are pertinent considerations, and

the IAD's assessment of them is grounded in the evidence. The IAD concludes that, "the couple offered persuasive testimonial and documentary evidence that supports the genuineness of their relationship" (IAD Decision at para 34). This finding is not contested by the Applicant.

[25] The IAD then turns to a consideration of the first branch of the test, which asks whether the marriage was entered into primarily for the purpose of acquiring any status or privilege under the Act. Its analysis begins with the following statement:

[35] First, it should be noted that the Federal Court maintains that the lack of genuineness presents strong evidence that the marriage was entered into for the purpose of gaining status. The panel submits that, *a contrario*, the genuineness of a marriage is strong evidence that it was not entered into for the purpose of gaining status. Specifically, the stronger the evidence in support of the genuineness of the marriage – and this is the case here – the less likely it was to have been entered into primarily for immigration purposes.

[Citations omitted.]

[26] The IAD considered the arguments submitted by the Minister's representative that raised doubts about the intention of the parties, focusing mainly on the husband's lengthy immigration history (going back for 20 years), the fact that he ended his previous marriage after his former wife withdrew her application to sponsor him, and the fact that he applied for permanent residence and a tourist visa after he was married. In addition, the IAD considered certain inconsistencies in the couple's narrative. The Minister's representative argued that all of these elements supported a finding that the husband's intention at the time of entering into the marriage was simply to find a way to obtain immigration status in Canada.

[27] The IAD rejected these arguments. It found that immigration history was relevant but noted that the test in paragraph 4(1)(a) required that it be satisfied that the applicant's decision to marry a Canadian was a primary factor in entering into the relationship. It considered the husband's efforts to remain in Canada, and found that his immigration history simply demonstrated that he had exercised his legal rights; it did not support a conclusion that his primary reason for marrying was to obtain immigration status.

[28] As to the husband's reason for separating from his second wife, the IAD accepted his explanation that he had felt uncomfortable about the behaviour of the daughter of his second wife towards him, and so he had terminated the relationship. In regard to the applications by the husband after the marriage for a temporary residence visa and tourist visa, the IAD concluded that these were explained by the fact that he wanted to stay with his wife, and their desire to have a child. For all of these reasons, the IAD concluded that the evidence did not support a finding that the marriage was entered into primarily for the purpose of obtaining an immigration status.

[29] It is neither necessary nor appropriate to enter into a detailed examination of the IAD's treatment of the evidence on the various points; it is not the role of a reviewing court to re-weigh the evidence. However, in assessing the reasonableness of a decision in accordance with the *Vavilov* framework, a reviewing court must consider whether the decision is based on an internally coherent chain of reasoning that is justified in light of the legal and factual constraints that bear on the decision.

[30] The core of the difficulty with the IAD's decision is that it does not indicate whether or how it took account of the key legal elements relating to subsection 4(1)(a) of the *Regulations* or

how it assessed the key facts that are relevant to this aspect of the analysis. A few examples will suffice to make the point.

[31] First, it bears repeating that the current definition requires an assessment of two different legal tests to be measured at two different points in time (see *Moise* and *Trieu*). This will obviously involve an assessment of evidence for each branch, and the evidence that is most pertinent for each analysis is defined by these legal tests. While there may be some evidence which is pertinent to both branches of the test, it is vital that each analysis take into account the relevant evidence measured with regard to the appropriate time frame (*Gill v Canada (Citizenship and Immigration)*, 2010 FC 122 at para 13). As the Supreme Court states in *Vavilov* at para 99, a reasonable decision will justify its conclusion with reference to “the relevant factual and legal constraints that bear on the decision.”

[32] In this case, the husband’s immigration history, and the timing of certain key events, is relevant to considering the parties’ intention in entering into the marriage. While not determinative, the fact that the husband was in a previous marriage, which ended after his former wife withdrew her sponsorship application, is clearly a pertinent fact. However, it is not considered by the IAD. Instead, the decision considers the husband’s explanation for why he terminated the relationship. This may be relevant, but it is surely not the main point – the timing of and reasons for the former wife’s withdrawal of the sponsorship are the most relevant considerations insofar as they may bear upon an assessment of the husband’s intention in entering into the current marriage. The IAD decision does not explain whether or how these elements were considered.

[33] Similarly, while the IAD is correct to find that there is a relationship between the two branches of the test, and that the evidence showing the genuineness of a marriage may be an indication that it was entered into for a genuine purpose (*Gill v Canada (Citizenship and Immigration)*, 2014 FC 902 at para 15), the two tests are distinct and not determinative of the other. The challenge, then, is to ensure that evidence going to the genuineness of a marriage is used to bolster a conclusion about the intention at the time of entering into a marriage; that conclusion must be reached, however, by considering the evidence that is relevant for that time period.

[34] In this case, it is not clear what evidence the IAD assessed about the parties' relationship prior to the marriage to support its conclusion about their intentions. The decision focuses instead on evidence that relates to events subsequent to the marriage, with very little analysis of the context and evolution of the relationship leading up to the marriage. While the IAD forms conclusions about the Minister's arguments, there is no analysis of the relevant evidence.

[35] For these reasons, I find that the Applicant has demonstrated that "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).

[36] The application for judicial review is granted. The matter is remitted back to a different panel of the IAD for reconsideration.

[37] The Respondent proposed the following as a question of general importance for certification: "Whether the Immigration Appeal Division has an obligation to repeat factors it

analyzed in one part of the analysis under subsection 4(1) of the *Regulations* when considering the second part of that test?” The Applicant opposed the certification of this question, and both parties requested the opportunity to make further submissions if I was considering certifying this question.

[38] The test for a certified question under paragraph 74(d) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 has recently been confirmed (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 [*Lunyamila*]). One key consideration is whether the question being proposed for certification was raised and dealt with by this Court; another is whether the question turns on the unique facts of the case. If neither of these considerations are met, the certified question will amount to a reference to the Court of Appeal, which is not permitted (*Lunyamila* at para 46; *Canada (Citizenship and Immigration) v Kassab*, 2020 FCA 10 at para 72).

[39] The question proposed here was not dealt with at the hearing of this case, nor was it necessary for my decision in this matter. It involves a question that is intensely factual, and I do not find that it meets the test for certification.

JUDGMENT in IMM-3795-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The matter is remitted back to a different panel of the Immigration Appeal Division for reconsideration.
3. There is no question of general importance for certification.

“William F. Pentney”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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