Federal Court  Cour fédérale

Date: 20200623

Docket: IMM-2431-19

Citation: 2020 FC 719

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, June 23, 2020

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

ELLIS ISABEL MUNOZ PENA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Minister of Citizenship and Immigration, is seeking judicial review of a decision rendered on April 1, 2019, by the Immigration Appeal Division (IAD) (Decision), determining that the marriage between Ellis Isabel Munoz Pena (the respondent) and her husband, Oscar Luis Garcia, was genuine and was not entered into primarily for the purpose of

acquiring a status or privilege, and therefore not contrary to subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations].

II. The facts

[2] The respondent was born in the Dominican Republic. She is a permanent resident, who arrived in Canada in 2009. She was sponsored by her first husband, whom she divorced less than a year after arriving in Canada. She resides in Canada with her two daughters.

[3] In 2011, during a vacation in the Dominican Republic, she met Luis Oscar Garcia. They saw each other for half an hour and stayed in touch. At that time, Luis Oscar Garcia was in a relationship, and his son was born in 2012. In October 2013, the respondent and Mr. Garcia started a relationship after communicating via social media.

[4] On February 14, 2014, the respondent proposed to Mr. Garcia by telephone, and he accepted. The respondent travelled to the Dominican Republic with her two daughters and married Mr. Garcia on July 15, 2014. This was the first time they had seen each other in person since their first meeting. The respondent stayed in the Dominican Republic for a few weeks before returning to Canada. Mr. Garcia remained in the Dominican Republic.

[5] Since their marriage, the respondent has visited her husband once a year for one to two weeks, in 2016, 2017 and 2018.

[6] On May 25, 2015, the respondent filed a sponsorship application, and Mr. Garcia filed an application for permanent residence. He did not include his son, who would stay with his mother in the Dominican Republic, in the application.

[7] On November 28, 2016, an interview with Mr. Garcia was held to determine the genuineness of the marriage. During the interview, the visa officer noted, among other things, the short time that the spouses spent together during the two years before the marriage proposal, insufficient evidence demonstrating their life together as well as Mr. Garcia's lack of knowledge regarding how the relationship's progressed, how the marriage proposal was made and when he was engaged. The officer was not convinced that the marriage was genuine and, on December 12, 2016, a decision to that effect was made.

[8] The respondent appealed the decision to the IAD. Following a hearing on March 8, 2019, at which the respondent and her husband testified, the IAD allowed the appeal. The IAD concluded, among other things, that the parties had not seen each other more often because of financial difficulties, that they communicated almost every day, and that their behaviour was as expected for a married couple living at a distance.

III. Issues and standard of review

[9] The only issue is whether the IAD's decision was reasonable.

[10] The standard of review applicable to the issue of whether a marriage is genuine is reasonableness (*Canada (Citizenship and Immigration) v Genter*, 2018 FC 32 at para 10 [*Genter*]; *Canada (Citizenship and Immigration) v Moise*, 2017 FC 1004 at paras 17–18).

[11] The Supreme Court's recent decision in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] does not change this conclusion. In the circumstances of this case, and considering paragraph 144 of that decision, it is not necessary to ask the parties to make

submissions on the standard of review or its application. As in the Supreme Court's decision in *Canada Post Corporation v Canadian Union of Postal Workers*, 2019 SCC 67 at para 24 [*Canada Post Corporation*], "[n]o unfairness arises from [applying the analytical framework established in *Vavilov* to these proceedings] as the applicable standard of review and the result would have been the same under the *Dunsmuir* framework".

[12] In judicial review based on the deferential standard of reasonableness, it must be determined, among other things, whether the process and the decision show that the decision maker actually "analyzed" the evidence, applying the appropriate legal test, and that the analysis in the decision is "based on reasoning that is both rational and logical" (*Vavilov* at para 102).

[13] There is case law stating that the standard of review applicable to the issue of whether the IAD conflated and confused the two branches of subsection 4(1) of the Regulations is correctness (*Trieu v Canada (Citizenship and Immigration)*, 2017 FC 925 at para 21 [*Trieu*]). That approach does not comply with the analytical framework established by *Vavilov* (see paras 108–110). The standard of review with respect to this issue is reasonableness.

IV. Analysis

[14] The applicant submits that the IAD made two fatal errors:

A. It did not consider the two branches of subsection 4(1) of the Regulations separately, and

B. It failed to address the relevant facts, including gaps and contradictions in the evidence.

A. *Interpretation of subsection 4(1) of the Regulations*

[15] Subsection 4(1) of the Regulations reads as follows:

4(1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or 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.

[16] This provision requires an assessment to determine whether the marriage was entered into primarily for the purpose of acquiring a status or privilege under the *Immigration and Refugee Protection Act*, SC 2001, c 27, (the primary purpose test) and whether it is genuine (the genuineness of marriage test). A negative finding regarding either of these tests is sufficient to prevent the spouse in question from obtaining the visa required to come to Canada: *Dalumay v Canada (Citizenship and Immigration)*, 2012 FC 1179 at para 25; *Singh v Canada (Citizenship and Immigration)*, 2014 FC 1077 [*Singh*].

[17] It should also be noted that the tests deal with different time periods: the primary purpose test requires an examination of the intentions of each spouse when the marriage took place ("was entered into . . . for the purpose of", Regulations, paragraph 4(1)(a)), while the genuineness of the relationship must be assessed at the time of the decision ("is not genuine", Regulations, paragraph 4(1)(b)): *Singh* at para 20; *Gill v Canada (Citizenship and Immigration*), 2012 FC 1522 at para 33.

[18] The applicant claims that the IAD erred in not addressing the two tests separately in its analysis and in using the same facts to assess both elements.

[19] I am not convinced.

[20] I agree that it is problematic that the IAD's analysis structure lists "the intent of the parties to the marriage" as a factor in the genuineness of the marriage, citing *Chavez v Canada (Citizenship and Immigration)* (IAD TA3-24409), January 17, 2005 [*Chavez*]. It is true that *Chavez* is still authoritative and is often cited as regards genuineness factors, but it should be noted that that decision was rendered before the tests in subsection 4(1) of the Regulations became disjunctive. It would be better to mention this when the judgment is cited to ensure that the decision maker is not misled.

[21] However, in this case, I do not agree that the IAD erred in law in applying the wrong tests. On the contrary, I am of the opinion that the IAD's analysis shows that the appropriate tests were considered. I agree that the situation is similar to that in *Trieu*.

[22] In that case, Mr. Trieu pointed to passages in the IAD's decision where it made findings that the marriage was entered into for the purpose of acquiring status and was not genuine, without making a distinct finding and without referring to the specific evidence supporting each part of subsection 4(1). In reading the entire reasons, Justice Catherine Kane found that the IAD had not erred: it had indicated that paragraphs (a) and (b) were disjunctive; had considered some of the same evidence, which was not an error; and had indicated that, although more detailed reasons were provided for one of the tests, it had not ignored the other test (at paras 22–28).

[23] Likewise, in *Budhram v Canada (Citizenship and Immigration)*, 2019 FC 1185, the IAD did not structure the decision such that the two tests were analyzed separately, but reading the decision shows that the IAD understood and properly applied subsection 4(1) of the Regulations (at para 26).

[24] In this case, it is fairly obvious that the IAD did not structure its decision so as to separate the analysis of the two branches of subsection 4(1). However, it clearly states at paragraph 2 that both branches should be considered. In addition, it mentions the two factors again at paragraph 3 and specifies that the branches are analyzed at different points in time, stating that the respondent must establish "on a balance of probabilities, that her marriage is genuine and that it was not entered into primarily to acquire any status or privilege under the Act". This is reiterated in its conclusion (at para 26). In addition, the IAD analyzes the intention of the parties to the marriage separately from the other genuineness factors and makes a separate finding in this regard (Decision at para 8). In that analysis, it looks at what the couple's plans seemed to be at the time of the marriage in relation to their life together and their children, and why they got married (Decision at paras 6-7), that is, evidence related to the time component required for this branch.

[25] For all of these reasons, I do not accept the applicant's contention that the IAD erred in dealing with the two branches of subsection 4(1) of the Regulations jointly.

B. *The IAD's fact analysis*

[26] The applicant submits that the IAD's decision is not transparent or intelligible and does not demonstrate that the IAD correctly understood the relevant facts. For example, the IAD

concluded that the relationship between the parties has lasted eight years. However, the parties were in a relationship in 2011 and their relationship became romantic in October 2013, which was less than eight years ago. In addition, contrary to its conclusions, there is no evidence on the record regarding communications between the parties from 2011 to 2013. Finally, the IAD did not explain why it disregarded what happened during the interview with the visa officer, specifically, the fact that the respondent's husband lacked knowledge, which makes its decision unreasonable.

[27] I disagree.

[28] Let us begin with the analytical framework set out in *Vavilov*, which is summarized in *Canada Post Corporation*, at paragraph 2: "The standard of review is reasonableness. This Court's role is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints". The Supreme Court of Canada also noted the following:

> [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*).
>
> . . .

> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on . . . are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100). . . .

[29] In addition, the Federal Court owes deference to the IAD's assessment of the evidence by virtue of its position as trier of fact (*Sivapatham v Canada (Citizenship and Immigration)*, 2016 FC 721 at para 12; *Pabla v Canada (Citizenship and Immigration)*, 2018 FC 1141 at paras 12–13) [*Pabla*].

[30] The applicant refers to the visa officer's decision and the inconsistencies he raised. However, the IAD's role is to determine credibility during the hearing. As long as the conclusions and inferences drawn by the IAD are reasonably open to it based on the evidence, its conclusion should not be interfered with (*Yu v Canada (Citizenship and Immigration*), 2016 FC 540 at paras 13–14). In addition, the IAD's role is not limited to the equivalent of judicial review: it has the jurisdiction "to make substantive determinations which may or may not lead it to substitute its own assessment" (*Canada (Citizenship and Immigration) v Abdul*, 2009 FC 967 at para 30).

[31] I agree with the applicant that there is no evidence to show that the relationship between the parties has lasted for eight years, but it is evident that the IAD clearly understood that they met in 2011, and that their relationship became romantic in 2013.

[32] The IAD's decision shows that it understood the essence of the analysis. The IAD noted, on the one hand, that the parties did not spend much time together: "The panel understands that, for financial reasons, the appellant was unable to spend more time with the applicant;

nevertheless, it considers six weeks of cohabitation over eight years to be a low ratio." On the other hand, the IAD also noted there was ample evidence of telephone bills, text messages and money transfers between 2013 and 2019. In addition, whether or not the parties lost contact between 2011 and 2013 was addressed at the hearing before the IAD.

[33] The applicant also submits that the IAD did not explain why it disregarded the inconsistencies raised by the visa officer. He cites *Genter*, a decision in which the Court found that inconsistencies and contradictions related to the genuineness of a marriage, including those detailed by the visa officer, must be explained by the IAD.

[34] In this case, the IAD asked questions about the inconsistencies in the testimony and addressed several of them in its reasons. It did not explicitly address the fact that the parties saw each other only once in person before the marriage proposal or that Mr. Garcia had little knowledge of his wife's first husband at his first interview, but it dealt with the development of the relationship. The IAD also asked Mr. Garcia about this during the testimony. The IAD addressed the fact that he was unable to respond clearly during the interview with the visa officer while he was able to do so at the hearing and explained its reasoning in that regard. The IAD also drew a negative inference, stating that it was not satisfied with the reasons given for the respondent's money transfers to Mr. Garcia.

[35] At paragraph 20 of the Decision, the IAD indicated that the parties knew each other well, contradicting each other only on details, such as who sent a friend request on Facebook in 2011. It concluded by stating that it noted "one or two [minor] contradictions. . . [that] do not undermine [the] credibility" of the parties (at para 26).

[36] Regarding this point, I agree that some of the contradictions—like forgetting the year of the engagement—were perhaps not minor. However, following the hearing, the IAD was satisfied with the parties' credibility. At that time, it asked questions about Mr. Garcia's confusion at the interview, the short time he spent with the respondent and the couple's plans regarding their children.

[37] I am not satisfied that failing to explicitly state all the inconsistencies or problems in the evidence was an error warranting the Court's intervention. I agree that the IAD did not omit all the weaknesses in the evidence or the facts that do not support the respondent's application. The Decision indicates that the IAD weighed all of the evidence and conducted an intelligible analysis in light of the facts and the applicable law.

[38] I agree that the decision is reasonable. I am of the view that any shortcomings or flaws in the decision are not sufficiently central or significant to render the decision unreasonable.

V. Conclusion

[39] Applying the *Vavilov* framework of analysis and given the degree of deference owed to the IAD, there is no need to interfere with the decision in this case.

[40] In conclusion, I can do no better than to reiterate what I stated in *Pabla*:

> [62] Having made these findings, I would adopt the following passage from the decision of Justice David Near in *Valencia v Canada (Citizenship and Immigration)*, 2011 FC 787, which applies with equal force to the case before me:
>
> > [24] Determining whether a marriage is genuine, and assessing the true intentions of the parties as they entered into that marriage is a difficult task

> fraught with many potential pitfalls. As I review the record I am cognizant of the challenge faced by the IAD in hearing such an appeal, and am mindful that as long as the IAD draws inferences that are reasonably open to it based on the evidence, it is not appropriate for the Court to interfere, even had I been tempted to come to a contrary conclusion (*Grewal v Canada (Minister of Citizenship and Immigration)*, 2003 FC 960, 124 ACWS (3d) 1149 at para 9).

[41] Although in this case there is no sufficiently central or significant error to render the decision unreasonable in light of the fact that the IAD understood and applied the correct legal test, I note that it would have been beneficial to structure the decision so as to clearly demonstrate the disjunctive nature of the test in subsection 4(1) of the Regulations. In another case, using a structure like the one in the decision at issue could be fatal.

[42] For all of these reasons, the application for judicial review is dismissed.

[43] There is no serious question of general importance to be certified.

JUDGMENT in IMM-2431-19

THE COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. There is no serious question of general importance to be certified.

"William F. Pentney"
Judge

Certified true translation
This 10th day of July 2020

Margarita Gorbounova, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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