Federal Court  Cour fédérale

**Date: 20210601**

**Docket: IMM-1404-20**

**Citation: 2021 FC 521**

**Ottawa, Ontario, June 1, 2021**

**PRESENT: The Honourable Mr. Justice Brown**

**BETWEEN:**

**THI THU PHAN**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

# JUDGMENT AND REASONS

## I. Nature of the matter

[1] This is an application for leave and judicial review of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada dated February 5, 2020 [Decision]. In 2018, the IAD dismissed the Applicant's appeal of a removal order issued by the Immigration Division [ID] because of her misrepresentations about her marriage of convenience,

pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The IAD's decision was set aside by Justice Strickland in *Phan v The Minister of Citizenship and Immigration*, 2019 FC 435 [*Phan 2019*], and sent back to the IAD for reconsideration.

[3] The IAD dismissed the Applicant's appeal a second time in the 2020 Decision now before this Court, and refused relief on Humanitarian and Compassionate [H&C] grounds.

## II. Facts

[4] The Applicant is a citizen of Vietnam. She became a permanent resident of Canada in August 2007 after entering a marriage of convenience. The Applicant was 18 or19 at the time of this marriage, which she says was orchestrated by her aunt. The Applicant arrived in Canada in August 2006 as a permanent resident. The Applicant and her first husband were divorced within a year.

[5] In the fall of 2008, the Applicant met her current husband. In June 2009, she gave birth to their first child and in September 2014, she gave birth to their second child. The Applicant and her Canadian husband now have two Canadian children, ten and five years old at the time of the Decision. The Applicant and her spouse testified if she is removed from Canada, the children and their father would remain in Canada to maintain their establishment.

[6] She and her husband own and operate a nail salon with a varying but small number of employees.

[7] In 2014, the Canadian Border Services Agency [CBSA] commenced an investigation into her non-genuine first marriage and sponsorship to Canada. The Applicant falsely claimed her first marriage was genuine and that it had broken down.

[8] Paragraph 40(1)(a) of *IRPA* states a permanent resident is inadmissible for directly or indirectly misrepresenting facts or withholding material facts:

| **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; |

[9] In May 2016, the CBSA referred the matter to the ID for an admissibility hearing.

[10] At the admissibility hearing, the Applicant acknowledged she entered into a marriage of convenience and was issued an Exclusion Order. She appealed this decision to the IAD.

[11] Before the IAD, the Applicant did not contest the validity of the removal order but raised H&C grounds. The IAD dismissed the Applicant's appeal and found the Applicant's initial misrepresentation and lack of remorse outweighed the positive H&C factors. The IAD also found the Applicant's children would not suffer significant hardship in Vietnam and removing them would not be contrary to their best interests.

[12] The Applicant sought judicial review of the IAD's decision and Justice Strickland in *Phan 2019* found the IAD failed to adequately engage with her establishment and the best interest of her children. Judicial review was granted and the matter was remitted for re-determination.

## III. Decision under review

[13] On November 19, 2019, the IAD held the reconsideration hearing Ordered by Justice Strickland. At this hearing, the Applicant and her husband clarified earlier evidence and provided an update on their circumstances. The IAD also relied on the transcript of the Applicant's and her husband's testimony before the IAD in the first hearing.

[14] The IAD again dismissed the Applicant's appeal. It found, among other things the Applicant's participation in her fraudulent marriage and lack of remorse were strong negative factors. The IAD found she was moderately established in Canada, which mildly favoured granting relief. Even though the Applicant and husband said the children would not accompany her to Vietnam, the IAD concluded they would all go back to Vietnam where the children would not be subject to significant hardship.

[15] Overall, the IAD found that although some factors moderately or mildly favoured the relief requested, they were outweighed by significant negative factors such as the initial misrepresentation and her lack of remorse.

## IV. Issues

[16] The only issue in this case is whether the Decision is reasonable.

## V. Standard of Review

[17] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] Justice Rowe said that *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] set out a revised framework for determining the applicable standard of review for administrative decisions. The starting point is a presumption that a standard of reasonableness applies. This presumption can be rebutted in certain situations, none of which apply in this case. Therefore, the Decision is reviewable on a standard of reasonableness.

[18] In *Canada Post*, Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [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*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision 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, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [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).

[19] The Supreme Court of Canada in *Vavilov*, at para 86 states "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies." The reviewing court must be satisfied the decision maker's reasoning "adds up":

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
>
> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual

> contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

[20] Furthermore, *Vavilov* makes it clear that the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances":

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

## VI. Analysis

[21] The Applicant submits the Decision is unreasonable for several reasons including that the IAD erred by "double counting" the Applicant's misrepresentation, and that the H&C analysis unreasonably was focussed excessively on hardship considerations.

[22] In my view, the determinative issue in this case is the alleged double counting of her misrepresentation concerning her non-genuine marriage, although there were issues concerning hardship as well.

[23] The Applicant submits the IAD was required to assess whether there were sufficient H&C factors using the factors from *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 [*Ribic*]:

> [14]…In each case the Board looks to the same general areas to determine if having regard to all the circumstances of the case, the person should not be removed from Canada. These circumstances include the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation or in the alternative, the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order. The Board looks to the length of time spent in Canada and the degree to which the appellant is established; family in Canada and the dislocation to that family that deportation of the appellant would cause; the support available for the appellant not only within the family but also within the community and the degree of hardship that would be caused to the appellant by his return to his country of nationality. While the general areas of review are similar in each case the facts are rarely, if ever, identical…

[24] The Applicant submits the IAD was required to weigh each factor, balance it against the initial misrepresentation and then decide whether the favourable factors outweigh the non-favourable factors. I accept this is one manner in which a decision maker may determine an H&C application.

[25] The Applicant further submits it is an error for the IAD to reduce the weight of a factor because of the underlying misrepresentation and count the misrepresentation against that factor once again in the final balancing act. This error has been recognized by the Court as the double counting error. In my view, this case is similar to *Jiang v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 413 [Simpson J] because the IAD counted the underlying misrepresentation against the same *Ribic* factor twice, reducing the weight assigned to the Applicant's establishment because of the misrepresentation and against in the final balancing:

[9] In this case, the IAD erred in its assessment of the second factor, the degree of establishment, by failing to give weight to this factor independently of the other factors. This error occurs at paragraph 27 of the Decision where the IAD says:

> Considering the appellant's assets and long-term employment, I am satisfied that the appellant is established in Canada however, the positive weight that I attribute to this factor is diminished by the fact that but-for the misrepresentation, the appellant would not have been able to establish himself in Canada. As such, I attribute only minimal positive weight to this factor.

[10] The IAD erred in that it weighed the misrepresentation against the degree of establishment when considering the degree of establishment and then it considered the misrepresentation again, at paragraph 37 of the Decision, where it concluded as follows:

> It is never an easy decision splitting up a family but the appellant has nobody to blame but himself. I have carefully weighed all of the factors in this case but I have found that the seriousness of the misrepresentation, together with my finding of lack of remorse with respect to the appellant's behaviour, in my view, outweighs all of the other factors. Granting a stay of removal in these circumstances would serve no purpose.

[11] The problem with this approach is that the IAD essentially double-counted the seriousness of the misrepresentation by using it to reduce the weight attributable to the establishment factor and then using it again in the final weighing.

[12] I cannot say that this error is immaterial because if the IAD had assessed degree of establishment independently of the misrepresentation, the final tally might well have included two "considerable positives" and two "very negatives" as opposed to the result described above. It is therefore possible that the Decision might have been different if the IAD had not erred in its methodology."

[Emphasis added]

[26] The Applicant submits the IAD double counted the misrepresentation against the Applicant's establishment and thereby committed reviewable error. I agree. Specifically, on the important factor of establishment the IAD found the Applicant moderately established in Canada, but then reduced the weight assigned to establishment because it was enabled by misrepresentation – as a result of double counting, the moderate establishment only mildly favoured granting relief. This can be seen in the following conclusion of the IAD on establishment:

> [45] That being said, I find that the appellant has established that she has been working with the salon for approximately 8 or 9 years. The appellant's moderate establishment in Canada over the past 12 years and the support available to her are positive considerations. I find that the weight of this establishment is mitigated by the fact that it was made possible only through her ill-gotten status, obtained through the appellant's misrepresentation and by her continuing with the misrepresentation over a number of years.
>
> [46] In view of the above, while the appellant's establishment in Canada over the past 12 years is a positive factor, I find it to weigh only mildly in favour of granting special relief.
>
> [Emphasis added]

[27] While this conclusion on establishment was open to the IAD, it is clear from the following extract from the IAD's overall conclusion that her misrepresentation was double counted:

> [77] While there were a number of positive considerations weighing mildly to moderately in the appellant's favour, including those related to the appellant's establishment, family and community ties, family dislocation, as well as the best interests of her children, the strongest factors in this appeal are the two significant negative factors: the serious and deliberate misrepresentation that took place over many years, as well as the lack of genuine remorse for her actions. I find that the cumulative

> weight of the positive factors is not sufficient to overcome the strength of the negative considerations.
>
> [Emphasis added]

[28] The same double counting arises in connection with the IAD's assessment of 'the [Applicant's] family in Canada and the impact on the family that removal would cause.' This was another very important element of the IAD's assessment. In this respect the IAD concluded:

> [61] While I assign positive weight to this factor in the H&C assessment, its weight is mitigated by the fact that it has not been established on a balance of probabilities that the family would choose to separate in the event the appeal is dismissed and that there is little hardship if they choose to relocate to Vietnam as a family. In view of all the above, I find this factor to weigh only mildly in favour of granting special relief.
>
> [Emphasis added]

[29] However, this was also double counted in the overall conclusion:

> [77] While there were a number of positive considerations weighing mildly to moderately in the appellant's favour, including those related to the appellant's establishment, family and community ties, family dislocation, as well as the best interests of her children, the strongest factors in this appeal are the two significant negative factors: the serious and deliberate misrepresentation that took place over many years, as well as the lack of genuine remorse for her actions. I find that the cumulative weight of the positive factors is not sufficient to overcome the strength of the negative considerations.

[30] In my view this double counting given their importance amounted to reviewable error.

[31] I do not need to address the other issues, although I would say the IAD may well have made more of hardship than it ought to have given the requirement of *Kanthasamy v. Canada*

*(Citizenship and Immigration)*, 2015 SCC 61 to review hardship together with the factors in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338.

## VII. Conclusion

[32] In my respectful view, the Decision of the IAD is unreasonable because in double counting the misrepresentation against the positive factors it acted contrary to constraining jurisprudence.

## VIII. Certified Question

[33] Neither party proposed a question of general importance, and none arises.

**JUDGMENT in IMM-1404-20**

**THIS COURT'S JUDGMENT is that** judicial review is granted, the Decision is set aside, and the matter is remanded to a different decision maker for redetermination, no question is certified and there is no order of costs.

"Henry S. Brown"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1404-20 |
| **STYLE OF CAUSE:** | THI THU PHAN v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | MAY 25, 2021 |
| **JUDGMENT AND REASONS:** | BROWN J. |
| **DATED:** | JUNE 1, 2021 |

**APPEARANCES:**

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| Nicole Paduraru | FOR THE RESPONDENT |

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