

Federal Court



Cour fédérale

Date: 20211019

Docket: IMM-5588-20

Citation: 2021 FC 1091

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 19, 2021

PRESENT: The Honourable Associate Chief Justice Gagné

BETWEEN:

ANTA NDIAYE

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP CANADA**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] I have before me an application for judicial review of a decision of the Immigration Appeal Division [IAD] refusing the sponsorship application submitted by Anta Ndiaye for her husband, Ndongo Sene.

[2] The IAD found that the Senegalese couple's November 2016 marriage at the Senegalese Embassy in Berlin, Germany, was invalid because it failed to meet the formal requirements under German law.

II. Issue and standard of review

[3] This judicial review application raises only one issue: Did the IAD err in finding that the applicant's marriage was invalid?

[4] Although the parties have not taken a position on the issue, I am of the view that the standard of review applicable to the analysis of this issue is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; *Canada (Public Safety and Emergency Preparedness) v Gaytan*, 2021 FCA 163).

III. Analysis

[5] For the purposes of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [the Act], and for the purposes of the Regulations, subsection 1(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], defines a **family member** as including a spouse. Section 2 provides that where a marriage is solemnized outside Canada, it must be valid both under the laws of the jurisdiction where it took place and under Canadian law.

[6] The IAD was provided with a translation of the provisions of the introductory act to the civil code of Germany relating to family law under private international law. It reads as follows:

[TRANSLATION]

III Family Law

Section 13 Conclusion of marriage.

- (1) The conditions for the conclusion of marriage are, as regards each person engaged to be married, governed by the law of the country of which he or she is a national.
- (2) If under this law, a requirement is not fulfilled, German law shall apply to that extent, if:
 1. the habitual residence of one of the persons engaged to be married is within the country or one of them is a German national;
 2. the persons engaged to be married have taken reasonable steps to fulfill the requirement; and
 3. it is incompatible with the freedom of marriage to refuse the conclusion of the marriage; in particular, the previous marriage of a person engaged to be married shall not be held against him or her if it is nullified by a decision issued or recognized here or the spouse of the person engaged to be married has been declared dead.
- (3) A marriage within the country may only be celebrated subject to the form provided for here. A marriage between two persons engaged to be married, neither of whom is a German national, may, however, be celebrated before a person properly authorized by the government of the country of which one of the persons engaged to be married is a national, according to the formalities prescribed by the law of that country; a certified copy of the registration of the marriage in the Register of Births, Deaths and Marriages, kept by the person properly authorized therefore,

furnishes conclusive evidence of the marriage celebrated in that manner.

[7] For the purposes of these proceedings, it is not disputed that the “basic conditions” applicable to the applicant’s marriage are those provided for under Senegalese law and that they were met. The representative of the Senegalese Embassy in Germany was properly authorized to officiate the marriage and the applicant filed a *Copie intégrale d’acte de mariage* [complete copy of the marriage certificate] signed before a witness by the ambassador and civil registrar, as well as a *Certificat de mariage* [marriage certificate] issued by the Directorate of Legal and Consular Affairs of the Ministry of Foreign Affairs and Senegalese Abroad.

[8] The IAD nevertheless refused the applicant’s sponsorship application on the basis that the marriage was invalid for failure to meet the “formal requirements” for marriage. Pursuant to section 13(3), above, the IAD concluded that the failure to show that a certified copy of the marriage registration was kept in the German civil register invalidated the marriage.

[9] In my view, this was an unreasonable interpretation of the provision.

[10] First, this provision provides that a marriage may only be entered into in the prescribed form. For example, in Germany, only civil marriages are recognized.

[11] Second, it provides that a marriage between two persons, one of whom is not a German national, may nevertheless be celebrated before a person properly authorized by the government of the country of which one of the persons engaged to be married is a national, according to the

formalities prescribed by the law of that country. Although it is not specified that this applies to a marriage between two foreign nationals, it would make no sense if this were not the case. The formal requirements would therefore also be subject to Senegalese law.

[12] Lastly, this provision provides that the registration of a certified copy of the marriage certificate in the civil register kept by the person properly authorized to do so “furnishes conclusive evidence of the marriage celebrated in that manner”. I find it hard to believe that this provision, worded as it is, sets out a strict formal requirement for the applicant’s marriage. I also find it hard to believe that the failure to register the marriage certificate in the German civil register would invalidate a marriage that otherwise meets all the basic and formal requirements of Senegalese law.

[13] In the immigration officer’s notes, as in the Minister’s submissions to the IAD, it is argued that the applicant’s failure to submit evidence that the German authorities have recognized her marriage is fatal. However, if under German private international law the formal and basic requirements for a marriage between foreigners celebrated on its territory are those provided for by the law of the country of which they are nationals, it was, in my opinion, unreasonable to require such proof.

IV. Conclusion

[14] I am therefore of the view that the IAD’s decision was unreasonable and that the matter should be returned to it for redetermination. The parties have not proposed any questions of general importance for certification, and no such questions arise in this case.

JUDGMENT in IMM-5588-20

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed;
2. The matter is returned to the Immigration and Refugee Protection Board's Immigration Appeal Division for redetermination by a different member.
3. No question of general importance is certified.

“Jocelyne Gagné”

Associate Chief Justice

Certified true translation
Johanna Kratz

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5588-20

STYLE OF CAUSE: ANTA NDIAYE v THE MINISTER OF
IMMIGRATION, REFUGEES AND CITIZENSHIP
CANADA

PLACE OF HEARING: HELD VIA VIDEOCONFERENCE

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