Federal Court  Cour fédérale

Date: 20181004

Docket: IMM-1467-18

Citation: 2018 FC 995

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 4, 2018

PRESENT: The Honourable Ms. Justice Gagné

BETWEEN:

DREISBER ALCINA RODRIGUEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] Mr. Dreisber Alcina Rodriguez, a Cuban citizen who obtained permanent residence in Canada in March 2012, is contesting the removal order issued against him on the grounds that he is inadmissible for misrepresentation under paragraph 40(1)(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] The Immigration Division (ID) of the Immigration and Refugee Board determined that Mr. Rodriguez acted in bad faith when he entered into a marriage with a Canadian citizen for the purpose of obtaining permanent resident status in Canada.

[3] The Immigration Appeal Division (IAD) upheld the removal order and refused to grant special relief on humanitarian and compassionate grounds under paragraph 67(1)(*c*) of the IRPA. It is that decision that is the subject of this application for judicial review.

II. Facts

[4] In February 2010, Mr. Rodriguez met V.G., a Canadian citizen, while she was on vacation in Cuba. Over the next two years, the couple maintained a long-distance romantic relationship, during which time V.G. made several visits to Cuba.

[5] Mr. Rodriguez first spoke of marriage in July 2010, but it was on December 23, 2010, that he says he officially proposed.

[6] A wedding ceremony was held in Cuba in February 2011 and V.G. filed a sponsorship application on March 9, 2011. She continued her regular visits to Cuba until Mr. Rodriguez arrived in Canada and obtained permanent resident status on March 19, 2012.

[7] The relationship deteriorated upon Mr. Rodriguez's arrival in Canada, and the couple separated on October 6, 2012. Within days of his arrival, Mr. Rodriguez asked a translator what the impact of a divorce would be on his status in Canada.

[8] In December 2012, V.G. wrote to the ID to denounce Mr. Rodriguez.

[9] In January 2013, Mr. Rodriguez filed a motion to institute separation proceedings (including a motion for support to paid to him by V.G), to which V.G. responded with a motion for annulment of marriage.

[10] V.G. 's motion to annul the marriage was allowed on October 31, 2013. The Honourable Justice Nollet, JSC, found that Mr. Rodriguez never intended to make a life together with V.G. and sentenced him to pay her $2,500 in punitive damages for breach of trust.

[11] In March 2014, an ID member also found that Mr. Rodriguez had acted in bad faith towards V.G. and obtained his permanent resident visa by misrepresenting his true intentions toward V.G.

III. Decision under review

[12] Before the IAD, Mr. Rodriguez challenged the ID's finding of misrepresentation and, alternatively, sought special relief on humanitarian and compassionate grounds under IRPA paragraph 67(1)(*c*).

[13] He submitted new evidence, essentially letters and photos, and testified regarding their contents. Mr. Rodriguez's current spouse, C.G., also testified about her relationship with Mr. Rodriguez and the existence of humanitarian and compassionate grounds.

[14] The IAD dismissed both grounds of appeal. It was satisfied, on a balance of probabilities, that Mr. Rodriguez made a misrepresentation that induced an error in the administration of the IRPA. The evidence shows that Mr. Rodriguez acted in bad faith when he married V.G. in contravention of subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR):

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.

[15] The IAD took into account—although without considering it determinative—the Quebec Superior Court's decision to annul the marriage and to award punitive damages to V.G.

[16] It found, as had the ID, that Mr. Rodriguez's behaviour upon his arrival in Canada shows that he had no intention of making a life together with V.G. and that he "was constantly attempting to get more money from her, he belittled her, courted other women and quickly wanted to leave her." The IAD added that the new evidence only demonstrated that the romantic

claims made by Mr. Rodriguez prior to his arrival in Canada were not consistent with his attitude after his arrival.

[17] The IAD reiterated the ID's findings regarding Mr. Rodriguez's lack of credibility. He failed to convince that his version should be preferable to that of the other witnesses heard by the ID. His version of the facts kept changing, and his behaviour did not match his words.

[18] The IAD therefore found that Mr. Rodriguez had no intention of making a life together with V.G. and that he married her in order to obtain his permanent resident visa.

[19] The IAD also found that there are insufficient humanitarian and compassionate considerations to warrant special relief for Mr. Rodriguez.

[20] It believes that his misrepresentations are serious and that this negative factor weighs heavily on the scale. Without these misrepresentations, Mr. Rodriguez could not have obtained permanent resident status in Canada. Furthermore, he expresses no remorse and continues to deny having made any misrepresentation whatsoever.

[21] The IAD found that after more than six years in Canada, Mr. Rodriguez was not very established. He lives with his current spouse and because he does not have a stable job, he contributes little financially. He has had a number of unstable jobs and made an unsuccessful attempt to open his own restaurant. In 2015, he left Canada for several months to live with a male friend in Texas.

[22] He claims to have declared all of his income but is contradicted on this point by his current spouse, whose testimony, according to the IAD, is credible and objective. He therefore does not contribute adequately to Canadian society, which further affects his credibility.

[23] Mr. Rodriguez and C.G. live together as a couple, and he has the support of her family and the community. The IAD considered this a positive factor.

[24] He has proposed to C.G. in the past, but she refused, citing the recent breakdown of her previous relationship. C.G. has shared custody of her two children from a previous relationship who spend every other week with the couple. The IAD looked favourably on the children's letter in support of Mr. Rodriguez.

[25] The IAD found that Mr. Rodriguez did not demonstrate that he would suffer dislocation if he were to return to Cuba. He submitted newspaper articles on the deterioration of relations between Cuba and the United States since the current president's election, but the IAD found insufficient evidence of diplomatic dislocation.

[26] Mr. Rodriguez claims that he posts jokes about his country on the Internet, which would be a threat to his safety if he were to return. The IAD found no evidence that Cuban authorities know about his posts, nor that they would offend the authorities to the point of being a threat to his security.

[27] Mr. Rodriguez argues that it would be difficult for him to return to Cuba after living in Canada, citing possible difficulties related to employment and available health care. Yet, the IAD noted that he returned to his country several times in recent years without experiencing any particular problems. Furthermore, although he does not have a job waiting for him in Cuba, he also does not have stable employment in Canada. Finally, the evidence shows that he underwent surgery for a herniated disk a few years ago, but that his current state of health does not require any special care.

[28] Mr. Rodriguez said he is not safe in Cuba since his brother, who was a police officer, was murdered. However, he did not explain the circumstances in which that incident allegedly occurred or how it would pose a threat to him if he were to return. His mother, father and sister live in Cuba and could provide him with a place to stay, at least temporarily.

[29] Finally, it is true that he would be separated from C.G. and her children, but C.G. testified to the IAD that they can communicate by Internet and that she would visit him in Cuba if he had to go back.

IV. Issues and standard of review

[30] This application for judicial review raises the following questions:

A. *Did the IAD show any bias toward Mr. Rodriguez?*

B. *Did the IAD err in finding that Mr. Rodriguez made a misrepresentation within the meaning of paragraph 40(1)*(a) *of the IRPA?*

C. *Did the IAD err in finding that the humanitarian and compassionate grounds invoked are insufficient to grant Mr. Rodriguez special relief?*

[31] If there was bias on the part of the IAD, there would be a breach of a principle of procedural fairness that would warrant the Court's intervention (*Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at para 45).

[32] On the second and third issues, the applicable standard is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12).

V. Analysis

A. *Did the IAD show any bias toward Mr. Rodriguez?*

[33] Mr. Rodriguez submits that the IAD gave rise to a reasonable apprehension of bias:

1. By criticizing the fact that he was challenging the ID's finding of misrepresentation;
2. By indicating that the new evidence could have been presented to the ID and to the Superior Court, whereas the IAD hearing is a *de novo* hearing;
3. By indicating to the minister's counsel that there was no need to cross-examine him, an indication that its decision had already been made;
4. By displaying animosity towards him through irrelevant statements;
5. By misinterpreting his current spouse's testimony;
6. By minimizing his efforts to find employment and by discriminating against his status as a [TRANSLATION] "homemaker"; and
7. By citing the fact that he frequently goes out dancing to minimize the effects of his back pain.

[34] The test to determine whether there is a reasonable apprehension of bias is established by the Supreme Court of Canada in *Committee for Justice and Liberty et al. v National Energy Board et al.*, [1978] 1 SCR 369 at page 394, and confirmed in *Baker* at paragraph 46:

> ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . . [T]hat test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[35] An allegation of bias must be supported by convincing evidence and cannot be made lightly. The burden of proof is on Mr. Rodriguez, and the threshold to be met is high (*Fouda v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1176 at para 23). In essence, he must demonstrate that the decision-maker was closed-minded and not open to persuasion.

(1) Challenge to the finding of misrepresentation

[36] At the outset of the first hearing, the member questioned Mr. Rodriguez's counsel as it was not clear whether the appeal was only concerning the humanitarian and compassionate considerations or whether the finding of inadmissibility was also at issue.

> [TRANSLATION]
> BY THE MEMBER
>
> So Counsel— Counsel Roa, just to understand, are you challenging in law today or are you just presenting humanitarian and compassionate grounds?

[37] The response that follows shows that it was not clear, until the day before the hearing, that Mr. Rodriguez intended to challenge the validity of the removal order:

> [TRANSLATION]
> BY APPLICANT'S COUNSEL
>
> I had spoken with my colleague; I told her I was not sure because I had just come back from vacation; I was going to speak with my

> client. And yes, since my client intends to challenge in law and the humanitarian issues as well. So after a long discussion on Sunday with my client, that's right, we're going to challenge in law.

[38] The member expressed surprise given the previous decisions of the ID and the Superior Court, but nevertheless proceeded on the merits of the removal order.

> [TRANSLATION]
> BY THE MEMBER
>
> The gentleman probably went through—was there at a time in his life when he appeared before a [male] member of the ID, a [female] member of the ID, and in Superior Court. Both times it was—a judge and a member told the gentleman that they did not believe that he acted in good faith with respect to the genuineness of the marriage, and the gentleman still wants to challenge today despite that?
>
> BY APPLICANT'S COUNSEL
>
> Yes, Sir.
>
> BY THE MEMBER
>
> O.K. Good. So (inaudible)

[39] The Minister's representative protested because she had not been informed that the validity of the removal order would be challenged, but she indicated that, to avoid a lengthy hearing, she would rely on the transcripts of the evidence before the ID.

> [TRANSLATION]
> BY MINISTER'S COUNSEL
>
> No, but you didn't say that when we spoke, but (inaudible).
>
> BY APPLICANT'S COUNSEL
>
> I told you I wasn't sure, but—
>
> BY MINISTER'S COUNSEL

> You weren't sure— O.K. because we had witnesses for the minister before the Immigration Division, but we will rely on the transcripts. Yes. O.K.
>
> BY APPLICANT'S COUNSEL
>
> Yes, I didn't mean to take you by surprise, just (inaudible)—
>
> BY MINISTER'S COUNSEL
>
> (Inaudible) O.K. It's fine. That is reopening the debate. It's just— I just wanted to raise for the minister our evidence is solid. And so there were seven hearings and I hope I don't have seven hearings for this case (inaudible).

[40] The parties agreed that Mr. Rodriguez's testimony regarding the validity of the removal order would only relate to the new evidence submitted to the IAD, which was basically the photographs of him and V.G. and the e-mails they exchanged.

> [TRANSLATION]
> BY MINISTER'S COUNSEL
>
> It's up to you to challenge it, I will— I'm here to hear you, the member as well, but— I think it's— we're not going to re— we're not about to hold six hearings for this case. [Laughter] (inaudible) re-hear. So we're going to rely on certain things in the transcripts for the minister. We're not going to re-hear the witness.
>
> BY APPLICANT'S COUNSEL
>
> I agree with you; I'm not going to go over—
>
> BY MINISTER'S COUNSEL
>
> So maybe (inaudible)?
>
> BY APPLICANT'S COUNSEL
>
> —any issues that have already been raised. But I will draw the attention of the member or counsel, in the evidence that was in the record at the Appeal Division—at the Immigration Division, pardon me, there was not a complete copy of the sponsorship application.

> So there weren't the photos, the e-mails that (inaudible) had sent me, wedding photos, pictures of her trips, and that's it. The gentleman has submitted an enormous number of e-mails that I (inaudible).
>
> My client brought me some—a quantity of e-mails that was part of the sponsorship application that speaks of the relationship between her and my client. I think that there are important things to look at in there. So— my— the questioning will be on this issue, the e-mails, the conversations that the gentleman had with her.
>
> [Emphasis added.]

[41] The member again questioned Mr. Rodriguez's counsel to confirm his intention to challenge the legal validity of the removal order.

> [TRANSLATION]
> BY THE MEMBER
>
> Ms. Roa, I know you're representing your client today, and so— you can advise him or you can—
>
> BY APPLICANT'S COUNSEL
>
> I have given him advice.
>
> BY THE MEMBER
>
> —talk with him. And I know perhaps you will answer on your client's behalf, the question I'm going to ask you right now is, do you really think these e-mails are going to make a big difference? Do you think that a Superior Court judge who would have had access to those e-mails, or the Immigration Division member who would have had access to those e-mails would have reached different decisions in such an eventuality?
>
> BY APPLICANT'S COUNSEL
>
> Yes, I think so, Sir.
>
> BY THE MEMBER
>
> OK, then let's proceed.

[42] Considering how Mr. Rodriguez was unclear about the scope of his appeal until the day before the hearing and how the new evidence could have been submitted to the ID and the Superior Court, I do not believe that the member's comments were inappropriate or indicative of bias.

[43] The IAD admitted and weighed the new evidence and found that it brought "very little new information to that which is already on the record."

(2) Not a real *de novo* hearing

[44] Mr. Rodriguez cannot fault the IAD for not conducting a real *de novo* hearing because he was present when his counsel agreed that his testimony and that of his new spouse would only deal with the new evidence and the humanitarian and compassionate considerations. The IAD could therefore rely on the transcripts of the evidence before the ID. It conducted its own analysis of that evidence and made its own findings. In my opinion, Mr. Rodriguez's complaint is unfounded.

(3) No cross-examination of Mr. Rodriguez

[45] The fact that an adjudicator indicates that it is not necessary to cross-examine the party who has the burden of establishing the veracity of an alleged fact, or to hear the submissions about said party from the opposing party, is not necessarily a sign of bias on the part of the adjudicator. Rather, it is a sign that during direct examination, the party did not meet its burden and the adjudicator is concerned about the efficient use of hearing time.

[46] If the IAD was not satisfied after Mr. Rodriguez's testimony in chief, chances are it would have been even less so after cross-examination. In any event, the IAD is the master of its proceedings and may limit the evidence to what is necessary to ensure a proper hearing of the case. This is not a case where administrative efficiency takes undue precedence over the right of a party to fully present their case, since the IAD allowed Mr. Rodriguez's counsel to ask him all the questions she wished to ask and make the necessary submissions.

[47] Mr. Rodriguez's complaint is also unfounded.

(4) Irrelevant comments

[48] Mr. Rodriguez complains that the IAD made a number of irrelevant comments that he believes demonstrate the member's bias, including:

1. The fact that she doubts that he can help C.G.'s children with their French homework since he has difficulty speaking French and requires the assistance of an interpreter;
2. The fact that his sister is divorced from a Quebecer; and
3. The fact that the marriage between Mr. Rodriguez and V.G. was ultimately no different from that of other Quebecer–Cuban couples that ended in divorce.

[49] The IAD has the task of assessing the credibility of the witnesses it hears, and the duty to provide reasons for its negative findings. It can only do so by referring to the evidence presented to it. In this case, Mr. Rodriguez described himself as a [TRANSLATION] "homemaker" and stated, in particular, that he helped C.G.'s children with their math and French homework. Given his relatively poor French and the fact that he, in fact, required the assistance of an interpreter, he was exposing himself to what the IAD considered to be an attempt to embellish reality. The IAD only explained how it had reached that conclusion.

[50] In its reasons, the IAD appears to draw a negative inference from the fact that Mr. Rodriguez's sister is also divorced from a Quebecer. The relevance of this fact is difficult to determine, but its mere mention certainly does not support a finding of bias by the IAD. Rather, it suggests that the totality of the evidence was considered since it was a fact that was discussed at the hearing.

[51] Lastly, since Mr. Rodriguez was trying to satisfy the IAD that his marriage to V.G. was different from the numerous other marriages between Quebecer women and Cuban men that end up in divorce, he cannot fault the IAD, in light of all the evidence, for having found exactly the opposite.

(5) The testimony of Mr. Rodriguez's current spouse

[52] Mr. Rodriguez complains that the IAD misinterpreted certain parts of C.G.'s testimony. He complains that, from this testimony, the IAD gathered that:

1. C.G. has sent money to Mr. Rodriguez's family in Cuba in the past, when actually she only sent one transfer, which was a gift;
2. Communication via the Internet was possible with Cuba, when she actually said that it was sometimes bad;
3. Mr. Rodriguez proposed to her before his IAD hearing, but it was actually some time ago.

[53] Yet, these findings of fact are all supported by C.G.'s testimony. The only assertion that could cause confusion is that the marriage proposal took place prior to the IAD hearing. Although this statement is technically true, the evidence does not indicate exactly when it took place. However, this ambiguity is far from sufficient to allow for a finding that the member was biased.

[54] Just because the IAD interprets the evidence in an unfavourable manner for Mr. Rodriguez does not mean that the IAD is biased.

(6) Mr. Rodriguez's efforts to find a job and his status as a [TRANSLATION] "homemaker"

[55] First, I am of the opinion that the assessment of Mr. Rodriguez's integration into Canadian society, and his contribution to parental and household duties, should not be dealt with in the analysis of the IAD's impartiality or of procedural fairness issues.

[56] The only argument that can be considered under this heading is the one in which Mr. Rodriguez complains that the IAD discriminated against him on the basis of his status as a [TRANSLATION] "homemaker," and claims that he would have been treated differently if he had been a woman.

[57] At the hearing, I asked his lawyer what Mr. Rodriguez meant by [TRANSLATION] "homemaker" and where in the certified tribunal record was the evidence that he fit that definition. I did not get a clear answer to that question.

[58] In my view, the IAD did not discriminate against Mr. Rodriguez; it simply found that his contribution to the parental duties (every other week) and household duties was not sufficient to meet the definition of [TRANSLATION] "homemaker," and it compensates with the fact that he contributes so little financially. Mr. Rodriguez did not satisfy me, based on the evidence, that this finding would have been different if he had been a woman.

(7) Mr. Rodriguez's back problems

[59] Mr. Rodriguez complains that, at one point, the IAD acknowledged that he had back problems and, at another point, found that he was exaggerating their severity during his relationship with V.G.

[60] Yet, I am rather of the opinion that it was open to the IAD to find—after having acknowledged that he had undergone surgery for a herniated disk since his arrival in Canada—that Mr. Rodriguez's back pain could not have prevented him from being intimate with V.G. when he was going out dancing several times a week. The IAD only exercised its role as trier of fact.

[61] Therefore, I am of the view that "an informed person, viewing the matter realistically and practically—and having thought the matter through—" would not conclude that there is a risk of bias on the part of the IAD in Mr. Rodriguez's case.

B. *Did the IAD err in finding that Mr. Rodriguez made a misrepresentation within the meaning of paragraph 40(1)(*a*) of the IRPA?*

[62] Mr. Rodriguez repeats a number of arguments analyzed in the previous section and essentially complains that the IAD did not conduct an analysis that was independent of the ID's analysis into the genuineness of his marriage to V.G. He complains that the IAD failed to consider the factors established in *Chavez v Canada (Minister of Citizenship and Immigration)*, IAD TA3-24409, Hoare, February 17, 2005; [2005] IADD No. 353 (QL) at para 3:

> The genuineness of the marriage is based on a number of factors. They are not identical in every appeal as the genuineness can be

> affected by any number of different factors in each appeal. They can include, but are not limited to, such factors as the intent of the parties to the marriage, the length of the relationship, the amount of time spent together, conduct at the time of meeting, at the time of an engagement and/or the wedding, behaviour subsequent to a wedding, the level of knowledge of each other's relationship histories, level of continuing contact and communication, the provision of financial support, the knowledge of and sharing of responsibility for the care of children brought into the marriage, the knowledge of and contact with extended families of the parties, as well as the level of knowledge of each other's daily lives. All these factors can be considered in determining the genuineness of a marriage. The second prong of the test, whether the relationship was entered into primarily for the purpose of acquiring any status or privilege under the Act, is self-explanatory. The advantage sought in spousal appeals is generally entry to Canada and the granting to the applicant of permanent resident status as a member of the family class.
>
> [Emphasis added.]

[63] In my view, the IAD did not err in not considering the factors identified in *Chavez* one by one. These factors, as well explained in that decision, concern the genuineness of the marriage. In this case, however, the ID and the IAD found that Mr. Rodriguez's actions were for the purpose of obtaining status or privilege under the IRPA.

[64] The two prongs of the test set out in subsection 4(1) of the IRPR are disjunctive, meaning that if just one of the two tests is met, the marriage is considered to have been entered into in bad faith (*Trieu v Canada (Citizenship and Immigration)*, 2017 FC 925 at para 36).

[65] In this case, there is no doubt that the marriage appeared to be genuine—according to some of the *Chavez* criteria—at the time the immigration officer authorized V.G.'s sponsorship of Mr. Rodriguez. It was Mr. Rodriguez's behaviour after his arrival in Canada that allowed the

ID and the IAD to find that the marriage was entered into primarily for the purpose of acquiring a status or privilege under the IRPA.

[66] In other words, it is incorrect to claim that if the *Chavez* factors tend to demonstrate the genuineness of a marriage, this "outweighs" the analysis of the true motivations of the marriage. While these two issues may overlap, they nevertheless remain distinct (*Singh v Canada (Citizenship and Immigration)*, 2014 FC 1077 at para 26).

[67] In finding that Mr. Rodriguez married primarily for the purpose of obtaining permanent resident status, the IAD did not have to re-analyze the genuineness of the marriage. I find that the IAD did not err in its assessment of the evidence and in finding that Mr. Rodriguez's marriage was motivated not by love but by obtaining a status under the IRPA.

C. *Did the IAD err in finding that the humanitarian and compassionate grounds invoked are insufficient to grant Mr. Rodriguez special relief?*

[68] Mr. Rodriguez's only argument to challenge the IAD's analysis of humanitarian and compassionate considerations is based on the alleged bias of the IAD. However, since I am of the view that the conduct of the IAD member raises no reasonable apprehension of bias, his analysis of the humanitarian and compassionate considerations is reasonable and will be upheld.

VI. Conclusion

[69] For reasons recorded herein, Mr. Rodriguez's application for judicial review is dismissed. No issues of general importance have been submitted for certification by the parties and there are none raised by this case.

JUDGMENT in IMM-1467-18

THE COURT ORDERS that:

1. The applicant's application for judicial review is dismissed;

2. No question of general importance is certified.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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