

Federal Court



Cour fédérale

Date: 20190325

Docket: IMM-2915-18

Citation: 2019 FC 364

Ottawa, Ontario, March 25, 2019

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

VAN MINH CAO

Applicant

and

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

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks review of the Immigration Appeal Division (IAD) decision that his marriage to a citizen of Vietnam is not genuine. The IAD refused the application for permanent resident (PR) status under the family class. The IAD found that the marriage was entered into primarily for the purposes of acquiring status or privilege under the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] For the reasons that follow, this judicial review is dismissed as the decision of the IAD is reasonable.

I. Background

[3] The 58-year-old Applicant is a Canadian citizen who immigrated to Canada from Vietnam in 1989. He was previously married from 1997 to 2007 and sponsored his first spouse to Canada. He married his current wife in Vietnam on January 26, 2014. His wife is a 35-year-old citizen of Vietnam. She divorced her first husband in September 2013 and has custody of her two children from marriage, now aged 9 and 12, who are included as dependants in the sponsorship application. She has several family members in Canada, including her parents and four of her siblings.

II. Decision Under Review

[4] In its reasons dated June 4, 2018, the IAD rejected the appeal from the refusal of a PR application as a member of the family class. The appeal was heard *de novo* on March 16, 2018, and it was refused under the “bad faith” provision of section 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*], which states:

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,

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

common-law partnership or conjugal partnership	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.

[5] The IAD made a series of findings leading to the conclusion that the marriage was not genuine. The IAD found that the Applicant and his wife did not provide credible testimony on how they came to know each other and how their relationship developed.

[6] The IAD found that the Applicant and his wife had not established that they met each other as early as 2010 as it was not credible that the Applicant would agree to take money for his wife's sister to her family's house in Vietnam. Further, the IAD noted that it was not established that the wife was even at her parents' house when the Applicant dropped off the money. The IAD found it more likely than not that they had concocted the story about the money delivery. As such, the Applicant and his wife did not establish that they met each other prior to their marriage in January 2014.

[7] The IAD found there to be troubling inconsistencies in the timeline of when the Applicant's first marriage broke down. The IAD further found that the Applicant and his wife did not establish how, when, and why their relationship progressed into marriage in 2014 as there was inconsistent evidence as to the relationship's development. For example, the Applicant alleged that he started communicating with his wife in July 2013, but she alleged that they began

communicating when the Applicant returned to Canada in February 2010 after delivering the money. This can be further contrasted with the wife's application wherein she states that they were introduced by her sister over Skype in mid-2012.

[8] They also testified that they met through the wife's younger sister, with whom the Applicant completed a nail technician course. The time and duration of the course was not consistent, and there was no documentary evidence like a certificate of completion to establish that he ever took such a course. The IAD did not find this testimony credible.

[9] The IAD also noted the fact that the Applicant's family, including his seven siblings who reside in Vietnam, did not attend the wedding. The IAD accepted that the Applicant traveled to Vietnam once more after the marriage, but that this trip was only made after his wife attended her visa office interview and her visa was rejected. The IAD did not find this visit to be sufficient to establish that the Applicant made efforts to spend time with his wife or her children in a manner consistent with being in a genuine marriage.

[10] The IAD noted that the wife seemed motivated to immigrate to Canada with her two sons in order to be reunited with her family in Canada, including her parents and her four siblings, especially after her divorce in September 2013.

[11] The IAD concluded that, taken in its entirety, the preponderance of evidence established that the Applicant and his wife concocted a story about the development of their relationship and entered into a marriage to facilitate her immigration to Canada.

III. Issues

[12] The Applicant raises a number of issues with the IAD decision that can be addressed as follows:

- a. Did the IAD misconstrue the evidence?
- b. Did the IAD make unreasonable plausibility findings?

IV. Standard of Review

[13] Decisions of the IAD in assessing the primary purpose of a marriage and the genuineness of the marriage are reviewed on a reasonableness standard (*Gill v Canada (Citizenship and Immigration)*, 2012 FC 1522 at para 17 and *Canada (Citizenship and Immigration) v Moise*, 2017 FC 1004 at para 17).

[14] Within the context of a reasonableness review, significant deference is owed to immigration officers who assess the *bona fides* of a marriage (*Shahzad v Canada*, 2017 FC 999 at para 14). Likewise, assessments of credibility are also owed particular deference to those decision-makers who have a firsthand opportunity to make credibility assessments (*Burton v Canada (Citizenship and Immigration)*, 2016 FC 345 at para 13).

V. Analysis

- A. *Did the IAD misconstrue the evidence?*

[15] The Applicant argues that the IAD misconstrued various facets of the evidence. He argues that the IAD misconstrued the evidence of when his wife's first marriage ended. This timeline is important in relation to when the Applicant and his wife initially met. The IAD states that the separation occurred in September or October 2010 and was finalized in March 2011. However, the Applicant argues that the transcript indicates that the separation occurred in late 2010. I do not agree that this finding by the IAD amounts to the IAD misconstruing the evidence. The IAD states that the separation happened in "September or October 2010" which can reasonably be considered late 2010.

[16] The Applicant also takes issue with the IAD's finding that the wife was not at her parents' house and was not living there in 2010 when he visited them on a trip to Vietnam. He argues that the evidence was that his wife was experiencing difficulties in her marriage in 2010, and that she visited her parents frequently prior to her separation. He argues that it was not her evidence that she was living with her parents in 2010. This statement of fact (that she was not living with her parents in 2010) made by the IAD does not amount to the IAD misconstruing the evidence. Rather, it is part of the IAD exercise of understanding the timing and context of this relationship.

[17] The Applicant alleges that the IAD misconstrued the evidence when it stated that the Applicant and his wife began speaking regularly in 2010, because they had only spoken once in 2010 and it was not until 2012 when they actually spoke regularly. However, again, the IAD was attempting to reconcile the various dates and events with the development of the relationship between the parties.

[18] As noted by the IAD the evidence of the Applicant and his wife was inconsistent. The challenges faced by the IAD with this evidence is evident from paragraph 11 of the reasons where the IAD states:

The inconsistencies on when the applicant's first marriage broke down become more troubling because the applicant ultimately testified that although she and the appellant did not see each other again during this time in Vietnam in 2010 (a time in which he was purportedly visiting with some of his seven siblings and other extended family in Vietnam), she began speaking with the appellant in early 2010 after he returned to Canada. The application form indicates that she and the appellant were "introduced" by the applicant's sister in mid-2012 at which time they began to speak regularly by Skype. The appellant testified that he started talking with the applicant by Skype in June 2013. There are a few screen shots in the record that appear to indicate that the appellant has communicated with the applicant and her children on Skype video calls but the documentary evidence does not establish continuous communication over any time period. Given the significant inconsistencies between the parties and their forms on how and when they began communicating and the vagueness of their testimony, I find that the appellant and applicant have not established how, when and why their relationship developed to the point that the appellant was ready to travel to Vietnam and marry the applicant in 2014.

[19] With respect to the Applicant taking a nail technician course, the Applicant argues that it was unfair for the IAD to draw the conclusion that it was not credible that he would have taken this course. Regardless, as the IAD correctly notes, there was no documentary evidence filed to support this claim.

[20] The Applicant also argues that the IAD's finding that the wife was "strongly motivated" to reunite with her family members in Canada was unreasonable as there was no evidence to support this finding. However, these were credibility inferences that the IAD was within its prerogative to make.

[21] Counsel for the Applicant argues that the inconsistencies in evidence are due to both the Applicant and his wife's lack of sophistication as they only have an elementary school education and testified through an interpreter. While their limited scope of sophistication may be true, this does not render a person incapable of telling an honest and consistent narrative with regards to marriage. This is not a case where the lack of sophistication caused the parties to incorrectly fill out pertinent forms (see *Dang v Canada (Citizenship and Immigration)*, 2014 FC 1195 at para 7). The Applicant has the burden to prove on a balance of probabilities the *bona fide* nature of the marriage in accordance with subsection 4(1) of the *IRPR* (*Kaur Nahal v Canada (Citizenship and Immigration)*, 2016 FC 81 at para 4).

[22] Overall, the onus was on the parties to provide clear and consistent evidence on the development of their relationship and the timelines. The IAD cannot be faulted for misstating the timelines when the evidence of the parties is confusing and contradictory (*Pabla v Canada (Citizenship and Immigration)*, 2018 FC 1141 at para 32).

[23] Here the IAD did not base its decision on one inconsistency or one misstatement. Rather, there were multiple areas where the IAD correctly noted that the evidence was simply irreconcilable. The IAD did not err in its assessment of evidence.

B. *Did the IAD make unreasonable plausibility findings?*

[24] The Applicant argues that the IAD made several unreasonable plausibility findings and relies upon *Lozano Pulido v Canada (Citizenship and Immigration)*, 2007 FC 209 to argue that plausibility findings should only be made in the clearest of cases (at para 37).

[25] The distinction between plausibility and credibility findings was discussed in *Leung v Canada (Minister of Employment and Immigration)*, 81 FTR 303 (FC) where the Court stated as follows at paragraphs 14 and 15:

Nevertheless, the Board is under a very clear duty to justify its credibility findings with specific and clear reference to the evidence... This duty becomes particularly [*sic*] important in cases such as this one where the Board has based its non-credibility finding on perceived "implausibilities" in the claimants' stories rather than on internal inconsistencies and contradictions in their narratives or their demeanour while testifying. Findings of implausibility are inherently subjective assessments which are largely dependant on the individual Board member's perceptions of what constitutes rational behaviour. The appropriateness of a particular finding can therefore only be assessed if the Board's decision clearly identifies all of the facts which form the basis for their conclusions. [emphasis added.]

[26] The IAD did not believe that the Applicant would agree to travel two hours to take \$500 to his wife's sister's house in 2010 when the money could be transferred electronically. The Applicant argues that the IAD did not provide a good reason for this plausibility finding given that the Applicant explained he was going to a nearby beach anyway.

[27] However, I do not read the IAD's finding on this point to be a plausibility finding but rather a credibility assessment of the Applicant's evidence in the context of the overall evidence. This is entirely within the IAD's discretion to do so.

[28] As well, the Applicant contends that the IAD made a plausibility finding regarding the fact that none of his seven siblings in Vietnam attended his marriage ceremony. Again, I do not read this as a plausibility finding. A review of the decision demonstrates that the IAD simply did not find it credible that the Applicant was so alienated from all of his siblings at the time of his marriage that none of them would attend the wedding in 2014, but that in 2016 he introduced his wife to his sister during a subsequent trip to Vietnam. This is a reasonable factor for the IAD to consider in the context of assessing the genuineness of the marriage.

[29] The Applicant's evidence was not sufficient to overcome the IAD's credibility concerns. On this judicial review the Applicant's arguments are essentially a disagreement with how the IAD weighed the evidence. The IAD pointed to numerous internal inconsistencies and contradictions as to why it determined the marriage was entered into primarily for immigration purposes and was not genuine.

[30] At all times, the onus was on the Applicant to demonstrate that their marriage was not entered into primarily for immigration purposes and that the marriage is genuine—the Applicant failed to meet this burden. The IAD's decision falls within a range of possible, acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

JUDGMENT in IMM-2915-18

THIS COURT'S JUDGMENT is that this judicial review is dismissed. No question is certified.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2915-18
STYLE OF CAUSE: VAN MINH CAO v MCI
PLACE OF HEARING: TORONTO, ONTARIO
DATE OF HEARING: JANUARY 17, 2019
JUDGMENT AND REASONS: MCDONALD J.
DATED: MARCH 25, 2019

APPEARANCES:

Jacqueline Swaisland

FOR THE APPLICANT

Brad Gotkin

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lorne Waldman Professional Corporation
Barristers & Solicitors
Toronto, Ontario

FOR THE APPLICANT

Attorney General of Canada
Department of Justice Canada
Ontario Regional Office
Toronto, Ontario

FOR THE RESPONDENT