

Federal Court



Cour fédérale

Date: 20200512

Docket: IMM-4162-19

Citation: 2020 FC 615

Ottawa, Ontario, May 12, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ANNE MARIE KEHN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of the Immigration Appeal Division (“IAD”) to dismiss an appeal of a visa officer’s decision to refuse the Applicant’s spousal sponsorship application for permanent residence. The IAD upheld the visa officer’s decision and found that the Applicant’s conjugal partnership was not genuine or had been entered into for the purpose of acquiring status, pursuant to section 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (“IRPR”).

[2] The IAD found that the testimony of the Applicant's partner raised issues of credibility, as he provided inconsistent answers on when he told his family about the relationship, and did not fully state his travel history on his Canadian student visa application. The IAD also held that there were inconsistencies between the Applicant and her partner's evidence. Furthermore, the IAD noted that the Applicant's partner had a number of "pull" factors that would have persuaded him to enter into a conjugal partnership for the purpose of obtaining status under the *Immigration and Refugee Protection Act, SC 2001, c 27 ("IRPA")*.

[3] The Applicant submits that the IAD failed to consider relevant evidence, including the sworn testimony of the Applicant's son, that the IAD unreasonably found the Applicant's partner to lack credibility, and that the IAD erred by making findings without regard to the material before it.

[4] For the reasons below, I find the IAD's decision is unreasonable. This application for judicial review is granted.

II. **Facts**

A. *The Applicant*

[5] Mrs. Anne Marie Kehn (the "Applicant") is a 50-year-old Canadian citizen. The Applicant's conjugal partner, Mr. Ahmad Sami Khalili ("Mr. Khalili"), is a 28-year-old citizen of Afghanistan. The Applicant and Mr. Khalili met online via Facebook—a social networking website—in August 2012. The Applicant notes in her affidavit that Facebook suggested adding

Mr. Khalili as a friend, which she did. The Applicant and Mr. Khalili began conversing over Facebook Messenger, and they soon developed a relationship over their common interests of poetry, music, and art.

[6] The Applicant has one adult child, Christopher (aged 32), from a previous marriage. The Applicant separated from her husband on April 13, 2013, and finalized the divorce on February 24, 2015. Mr. Khalili has never been married and does not have children of his own.

[7] In April 2013, the Applicant travelled to Turkey to visit Mr. Khalili, who had made a claim for refugee protection in Turkey. Subsequent to this trip, the Applicant made five other trips to Turkey and India to visit Mr. Khalili. Mr. Khalili had left Turkey towards the end of 2013, and commenced university studies in India.

[8] In the beginning, the Applicant's son was not supportive of the Applicant's relationship with Mr. Khalili, given the age difference, different cultures and backgrounds, and geographical distance. However, over time, the Applicant's son grew to appreciate and accept the relationship between the Applicant and Mr. Khalili.

[9] On March 2, 2016, the Applicant applied to sponsor Mr. Khalili for permanent residence as a conjugal partner. As the reviewing visa officer had concerns regarding the genuineness of the relationship, an interview was conducted with both the Applicant and Mr. Khalili on December 20, 2016. The Applicant travelled to New Delhi, India for this interview. Following the interview, the visa officer noted that there were inconsistencies in the dates of their

relationship, there had been little communication to family members about their relationship even after a few years, the couple was not able to show a significant degree of attachment and mutual interdependence, and the Applicant did not meet any of Mr. Khalili's friends on her short trips to India. The visa officer was not satisfied that the relationship was genuine and concluded that it had been entered into primarily for the purpose of acquiring status in Canada.

[10] On January 19, 2017, the Applicant appealed this decision to the IAD.

[11] For the IAD appeal, the Applicant submitted additional documentation to support the genuineness of her conjugal partnership with Mr. Khalili, including their travel history, communication history, money transfers, support letters, and photos. On February 8, 2019, at the IAD hearing, the Applicant, Mr. Khalili, and the Applicant's son provided testimonies.

[12] By decision dated June 20, 2019, the appeal was dismissed. The IAD held that, on a balance of probabilities, the conjugal partnership was not genuine.

B. *The IAD Decision*

[13] After considering the testimonies, record materials, documentary evidence, and the parties' submissions, the IAD found that there were significant gaps, discrepancies, and inconsistencies in the evidence for which satisfactory explanations were not provided. The IAD noted that although the Applicant and Mr. Khalili testified that they maintained regular communication and were able to provide some consistent knowledge of each other at the

hearing, the couple provided lacking and inconsistent responses that would “not be expected if they were in a genuine conjugal partnership”.

[14] For example, the Applicant was not aware of the fact that Mr. Khalili had applied for a student visa to Canada in December 2013 after he abandoned his refugee claim in Turkey, although the timing of this application was well over a year into the relationship. By December 2013, the Applicant had already made two trips to visit Mr. Khalili, the relationship had become intimate, and the couple had been communicating daily. The IAD found there was little evidence to explain why this information was not shared in a genuine relationship, where it would be expected that partners would discuss and share information about significant events.

[15] The IAD also found that there was inconsistent evidence on when Mr. Khalili told his family of his relationship with the Applicant, as Mr. Khalili’s testimony varied considerably with insufficient evidence to explain the discrepancy. At the earliest, Mr. Khalili testified that he informed his family in late 2013, and at the latest, in 2018. The IAD found that there was no cogent explanation on why Mr. Khalili waited approximately 18 months to 5 years to tell his family members, especially given the fact that Mr. Khalili had good relationships with them. The IAD also noted that family members would be informed in a genuine relationship where partners are frequently visiting each other overseas and planning a future life together. Although the IAD acknowledged there are inherent difficulties in disclosing a relationship that may not conform to familial expectations, it ultimately concluded that such difficulties did not overcome the evidence concerning the Applicant’s “lack of knowledge or integration” with Mr. Khalili’s family.

[16] While the IAD found the Applicant's testimony to be credible, it found that aspects of Mr. Khalili's testimony raised issues of credibility. For instance, on his student visa application submitted in 2013, Mr. Khalili did not state that he had claimed refugee status in Turkey or that he had spent time there. The IAD also concluded that there were several "pull" factors that would have persuaded Mr. Khalili to enter into a conjugal relationship to obtain status in Canada, i.e. the presence of siblings and other family members in Canada, and the desire to leave Afghanistan shown by an attempted refugee claim in Turkey and a study visa application to Canada.

[17] Furthermore, the IAD observed that the Applicant and Mr. Khalili were "not compatible in age" as the Applicant is 22 years older than her partner. The IAD noted that although this "incompatibility" is not determinative of the genuineness of the relationship, it bore an increased significance in the context of its other concerns. The IAD found that the Applicant and Mr. Khalili's vague future plans—especially if the appeal was dismissed—was not indicative of a genuine conjugal relationship.

[18] Ultimately, the IAD concluded that there was insufficient credible evidence to establish that there was a genuine conjugal partnership between the Applicant and Mr. Khalili.

III. **Issue and Standard of Review**

[19] The issue on this application for judicial review is whether the IAD's decision is reasonable, and in particular:

- A. Did the IAD err by making findings without regard to the material and failing to consider relevant evidence?

- B. Did the IAD unreasonably find Mr. Khalili to lack credibility?

[20] Prior to the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], the reasonableness standard applied to the review of the IAD's decision on assessing whether a relationship is genuine, or was entered into primarily for the purpose of acquiring status or privilege under the *IRPA*: *Burton v Canada (Citizenship and Immigration)*, 2016 FC 345 (CanLII) at para 15; *Gill v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1522 (CanLII) at para 17; *Akter v Canada (Minister of Citizenship and Immigration)*, 2015 FC 974 (CanLII) at para 20; *Aburime v Canada (Minister of Citizenship and Immigration)*, 2015 FC 194 (CanLII) at para 19. There is no need to depart from the standard of review followed in previous jurisprudence, as the application of the *Vavilov* framework results in the same standard of review: reasonableness.

[21] As noted by the majority in *Vavilov*, "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). Furthermore, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency," (*Vavilov* at para 100).

IV. Analysis

A. *Consideration of Evidence*

[22] The Applicant submits that the IAD erred by ignoring relevant evidence and making findings without regard to the evidence before it. In particular, the Applicant submits that the IAD erred by failing to consider the testimony of the Applicant's son, Christopher, as he showed direct and intimate knowledge about his mother's relationship with Mr. Khalili. The Applicant submits that Christopher's testimony corroborates the evidence and testimony provided by the Applicant and Mr. Khalili. The Applicant argues that the IAD erred in assigning no weight and giving little consideration to Christopher's testimony.

[23] The Applicant also submits that the IAD failed to meaningfully assess the extensive evidence provided in support of the genuineness of the relationship, namely: the couple's detailed knowledge of the Applicant's trips to visit Mr. Khalili; the Applicant's knowledge of Mr. Khalili's education and immigration history; Mr. Khalili's knowledge of the Applicant's medical condition; detailed knowledge of each other's families and daily life; detailed knowledge of the Applicant's first marriage; extensive and continuous communication; knowledge of future plans; details of common interests in poetry and music; details on discussions about children; and efforts to get married. The Applicant submits that these aspects of the evidence were not considered in a meaningful manner, and that the IAD focused on selective portions of the evidence while ignoring other aspects that would demonstrate the genuineness of the relationship. The Applicant cites *Salguero v Canada (Citizenship and Immigration)*, 2009 FC 486 (CanLII) [*Salguero*] at paragraph 13 for the proposition that the

failure to provide reasons why significant evidence that is contradictory to the panel's findings is neither relevant nor reliable may render the decision unreasonable.

[24] Additionally, the Applicant submits that there was no evidence before the IAD to support its conclusion that the Applicant lacked knowledge of Mr. Khalili's immigration history. On the contrary, the Applicant submits that she demonstrated a good knowledge when asked questions regarding Mr. Khalili's immigration history and refugee claim in Turkey. With regard to the timing of when Mr. Khalili opened up to his family members about his relationship, the Applicant notes that Mr. Khalili had expressed that he was having difficulty in remembering the details of when he first spoke to his family about the Applicant. The Applicant submits that Mr. Khalili's inability to recall such dates was an "irrelevant and peripheral matter" that was an improper ground for the IAD to base its conclusions.

[25] Furthermore, the Applicant argues that the IAD erred by failing to consider the testimony of the parties by concluding that the couple was "incompatible" in age. The Applicant and Mr. Khalili had explained that their age difference was not a barrier for their relationship. Lastly, the Applicant submits that "pull" factors cannot be considered to determine the genuineness of the relationship, and that Mr. Khalili's testimony was focused on his separation from the Applicant, not from his siblings in Canada.

[26] The Respondent submits the Applicant's position on this issue is a request for this Court to reweigh the evidence. The Respondent submits that the Applicant's or her son's beliefs that Mr. Khalili's evidence is credible does not render the IAD's decision unreasonable.

Additionally, the Respondent argues that after the IAD initially mentioned the testimony of the Applicant's son, the IAD was not required to make further specific references in reaching its conclusions. The IAD can be presumed to have considered the evidence. Furthermore, the Respondent submits that the Applicant's son's testimony did not explain the contradictions and omissions in Mr. Khalili's evidence, and thus did not contradict the IAD's determinative findings.

[27] With regard to the inconsistencies in Mr. Khalili's testimony regarding the timing of disclosure (of the relationship) to his family members, the Respondent submits that the IAD is clear as to why these inconsistencies were relevant in determining the genuineness of the relationship. The IAD explained that it would be expected that family members would be informed of a genuine relationship where partners are planning for a life together, frequently visiting overseas, and are in constant daily communication.

[28] On the issue of the age difference, the Respondent submits that the age-related concerns only became significant due to other concerns in Mr. Khalili's evidence. With respect to pull factors, the Respondent argues that the IAD's findings related to whether the relationship was entered into primarily for the purpose of acquiring status under the *IRPA*. The Respondent relies *Dalumay v Canada (Citizenship and Immigration)*, 2012 FC 1179 (CanLII) [*Dalumay*] at paragraphs 30 and 31 for the proposition that concerns about the primary purpose of the relationship may reasonably lead to concerns on the genuineness of the relationship.

[29] I agree with the Respondent that the IAD was not required to make further specific references to the Applicant's son's testimony in reaching its conclusions, as the IAD can be presumed to have considered all the evidence (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No. 598 (CA) at para 1). The IAD did not err in assigning little weight and consideration to Christopher's testimony.

[30] However, in my view, the IAD failed to meaningfully assess the extensive evidence provided in support of the genuineness of the relationship, and the IAD unreasonably found that there were significant gaps and inconsistencies in the evidence that could not be reasonably explained, when in fact, the few gaps and inconsistencies in the evidence were reasonably explained in the testimony.

[31] While the IAD found that the Applicant was not aware of the fact that Mr. Khalili had applied for a student visa to Canada in December 2013, and found this to be "lacking" of a genuine relationship because they had known each other for over a year, both the Applicant and Mr. Khalili testified that the Applicant had known about the student visa. The Applicant testified that Mr. Khalili had told her about his student visa application in October 2013, shortly after the application had been made. The Applicant was aware that Mr. Khalili's sister wanted to help Mr. Khalili apply to come to Canada as a student. Mr. Khalili similarly testified that the Applicant had been aware of the study visa application, and that she had expressed her happiness about it. I find that the IAD failed to provide reasons why the testimonial evidence that was contradictory to the IAD's findings was neither relevant nor reliable (*Salguero* at para 13).

[32] Additionally, although the IAD found that Mr. Khalili's testimony varied considerably on when he told his family about his relationship, and that there was insufficient evidence to explain the discrepancy, this "considerable" discrepancy and variation cannot be substantiated by what is contained in the record.

[33] Both the Applicant and Mr. Khalili noted that Mr. Khalili's family became aware of the relationship when Mr. Khalili moved back to Afghanistan from Turkey, as the family members started noticing him on the phone. The Applicant identified the timing as November 2013, and Mr. Khalili noted that it was sometime in 2013. Mr. Khalili testified again that the first time he told his father about his relationship was when he moved back to Afghanistan from Turkey. Mr. Khalili stated that his father was "well aware" of the relationship when he first told him, presumably due to the frequent phone calls. Mr. Khalili testified that his father approved of the relationship in a very "logical way" and that his father was "ok with [Mr. Khalili's] decision" to marry a non-Muslim, non-Afghani woman from Canada.

[34] Around the time that he told his father, Mr. Khalili also told his younger sister in Afghanistan and his brother in Canada about his relationship. Mr. Khalili testified that the rest of the family, i.e. Mr. Khalili's other siblings, would have found out about the relationship because the family members talk and share information with each other. Therefore, when Mr. Khalili told his father, he was "very sure that [his father] was going to talk to everyone in the family". Although there was an inconsistency with Mr. Khalili's statements at the visa office interview, where he indicated that only his father knew of the relationship around 2015, this was the single inconsistency. What the IAD characterizes as "significant inconsistencies" are actually

differences in the timing of when Mr. Khalili opened up to different family members of the relationship. For example, in 2013, Mr. Khalili told his father, and in 2018, he told his brother.

[35] Moreover, I am not persuaded by the Respondent's submission that the IAD provided a clear rationale as to why the inconsistencies were relevant in determining the genuineness of the relationship. Although the IAD explained that it would be expected that family members would be informed of a genuine relationship, and found that there was no cogent explanation on why Mr. Khalili "waited" to tell his family members, I note that Mr. Khalili testified that some of his family members were very religious with strong views and he knew they would not approve of the relationship. I find it unreasonable for the IAD to have dismissed a reasonable and cogent explanation that there are inherent difficulties in opening up to family members about a relationship, when one is aware of the strong disapproval.

[36] Also, given the factual context of family disapproval, I find it unreasonable for the IAD to expect that family members would be informed of one's relationship simply because it is a serious and genuine relationship. The IAD has employed circular reasoning in stating that, "While the panel accepts the difficulty of disclosing a relationship that may not fit familial expectations, this does not overcome the evidence concerning the lack of knowledge or integration of the [Applicant] and [Mr. Khalili's] relationship with [Mr. Khalili's] family." I have difficulty accepting that the Applicant could have been integrated with Mr. Khalili's family given the strong disapproval of some family members. The IAD has erred by failing to make findings of fact with regard to the evidence before it.

[37] As for the missing information in the student visa application, Mr. Khalili testified that some information may have been missing due to a language barrier. The form was filled out by Mr. Khalili's sister, and although they tried to complete the form truthfully, Mr. Khalili recognized that the form may have provided an incomplete travel history.

[38] Furthermore, while the IAD found that the Applicant and Mr. Khalili's vague future plans—especially if the appeal was dismissed—was not indicative of a genuine conjugal relationship, the IAD made no reference to contradictory evidence in Mr. Khalili's testimony, in which Mr. Khalili stated that he and the Applicant could stay in Uzbekistan or Tajikistan for some time, and noted that the relationship would continue. A deliberation over alternative plans, although not overly detailed, provided some evidence that the Applicant and Mr. Khalili planned to continue their relationship despite a failed spousal sponsorship application, which the IAD unreasonably dismissed as “vague”.

B. *Credibility Findings*

[39] The Applicant submits that the IAD erred by finding Mr. Khalili to not be credible despite having found the Applicant to be credible, in assessing the genuineness of the relationship. The Applicant takes the position that the IAD should have provided an explanation as to why it found the Applicant to be credible, but rejected the genuineness of the relationship.

[40] The Respondent submits that the onus was on *both* the Applicant and Mr. Khalili to demonstrate that they were in a genuine conjugal relationship through credible and reliable evidence, but notes that credibility and reliability concerns arose from Mr. Khalili's evidence.

The Respondent cites *Dalumay* at paragraph 28 for the proposition that it is reasonable for the IAD to question the genuineness of conjugal relationship based on concerns of one partner's evidence. The Respondent takes the position that the IAD did not contradict itself by concluding that the Applicant was credible, but that Mr. Khalili was not credible.

[41] In my view, it is reasonable for the IAD to question the genuineness of the conjugal relationship based on concerns arising out of one of the partner's evidence and testimony (*Dalumay* at paragraph 28). The IAD did not contradict itself by concluding that although the Applicant was credible, the genuineness of the relationship was under question because Mr. Khalili lacked credibility.

[42] However, given the unreasonableness of the decision in the IAD's consideration of the evidence, I find that the IAD's decision, as a whole, is unreasonable.

V. **Certified Question**

[43] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VI. **Conclusion**

[44] The IAD erred by failing to make findings without regard to the material and evidence before it. As a whole, the IAD's decision is unreasonable. This application for judicial review is granted.

JUDGMENT IN IMM-4162-19

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter is to be returned for redetermination by a different decision-maker.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4162-19

STYLE OF CAUSE: ANNE MARIE KEHN v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: MARCH 5, 2020

JUDGMENT AND REASONS: AHMED J.

DATED: MAY 12, 2020

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