Federal Court  Cour fédérale

Date: 20210715

Docket: IMM-1329-20

Citation: 2021 FC 744

Ottawa, Ontario, July 15, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

XIA ZHANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada [IAD], dated February 10, 2020 [the Decision], dismissing the Applicant's appeal of a decision by an immigration officer [the Officer]. The Decision refused the Applicant's application to sponsor her husband for permanent

residence as a member of the family class under the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations].

II. **Background**

[2] The Applicant, Xia Zhang, is a Chinese national and Canadian permanent resident. She is married to Xiaoyang He, a Chinese national. The Applicant and Mr. He were initially married in 1990, but they divorced on January 21, 2005. They had a son together in 1992. The Applicant married Shaoqing Zhou, a Chinese national and Canadian permanent resident, on February 6, 2005. He sponsored her to immigrate to Canada, and she landed as a permanent resident of Canada on November 12, 2006. She then returned to China within seven days of landing and divorced Mr. Zhou on January 9, 2007.

[3] The Applicant returned to Canada in March 2007 and sponsored her son to immigrate to Canada in April 2007. The Applicant subsequently returned to China and lived with Mr. He and their son in China from July 2008 to September 2009, at which point the Applicant's son's permanent residence application was approved. The Applicant and her son lived in Canada from 2009 until 2011.

[4] The Applicant travelled to China in 2011 and re-married Mr. He on April 6, 2011. Mr. He applied for visitor visas to Canada four times between 2012 and 2016 but was refused each time. In July 2018, the Applicant sponsored Mr. He for permanent residence under the family class as her spouse. The Officer refused the application on May 30, 2019. The Officer's Global Case Management System [GCMS] notes from May 30, 2019, indicate that the Officer believed that

Mr. He and the Applicant dissolved their marriage solely so that the Applicant could obtain permanent residence in Canada.

[5] As a result, Mr. He fell within s 4.1 of the Regulations, which provides as follows:

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 foreign national has begun a new conjugal relationship with that person after a previous marriage, common-law partnership or conjugal partnership with that person was dissolved primarily so that the foreign national, another foreign national or the sponsor could acquire any status or privilege under the Act.	**4.1** Pour l'application du présent règlement, l'étranger n'est pas considéré comme l'époux, le conjoint de fait ou le partenaire conjugal d'une personne s'il s'est engagé dans une nouvelle relation conjugale avec cette personne après qu'un mariage antérieur ou une relation de conjoints de fait ou de partenaires conjugaux antérieure avec celle-ci a été dissous principalement en vue de lui permettre ou de permettre à un autre étranger ou au répondant d'acquérir un statut ou un privilège aux termes de la Loi.

[6] The Applicant appealed the Officer's decision to the IAD. The IAD dismissed that appeal in the Decision that is the subject of this application for judicial review.

III. **Decision Under Review**

[7] The IAD explained that the Applicant did not meet her onus of establishing that she did not divorce the Applicant primarily so that she and her son could immigrate to Canada. She chose to rely on her own testimony before the IAD and did not call Mr. He or her son as witnesses. The IAD found that the Applicant's explanation for why she did not call Mr. He as a witness lacked credibility.

[8] The IAD pointed to several facts as suggesting that the marriage was dissolved primarily for the purpose of the Applicant and her son obtaining permanent residence: the timeline of the Applicant's divorce, her second marriage, the fact that she never resided with her second husband in Canada, her quick divorce from her second husband, her prompt sponsorship of her son, her return to living in the same residence as Mr. He, Mr. He providing her financial support, and her re-marriage to Mr. He. The IAD also observed that the delay in the Applicant sponsoring Mr. He was not inconsistent with the marriage being dissolved so that the Applicant could acquire status in Canada.

[9] The IAD also found that the Applicant's explanation for the breakdown of her first marriage stretched credulity. Specifically, the IAD questioned the credibility of the Applicant's explanation that she and Mr. He began living separate lives while living in their two-bedroom apartment, that she then met her second husband online, and that she asked her husband for a divorce and then registered her second marriage two weeks after the divorce. The Applicant testified that she settled in Canada in 2007, because she had been humiliated by the dissolution of two marriages, but the IAD found little evidence to suggest that her second marriage was widely known. The IAD found that the Applicant provided no credible explanation for why she married her second husband or why she was subsequently motivated to re-marry Mr. He.

[10] The IAD found that the record showed that Mr. He provided the Applicant with financial support from the time she returned to Canada with their son in 2009. The IAD found this consistent with their marriage being dissolved for an immigration purpose.

[11] The Applicant had explained the breakdown of her second marriage, alleging that she uncovered sordid sexual liaisons and financial machinations. The IAD did not find this testimony reliable, credible or trustworthy. The IAD considered the Applicant's assertions that Mr. Zhou had his own ulterior motives for marrying her but noted that such evidence would not establish that she was ever in a genuine marriage with Mr. Zhou or that she did not dissolve her marriage with Mr. He primarily in order to acquire status in Canada.

[12] The IAD concluded that the first marriage between the Applicant and Mr. He was dissolved primarily so that the Applicant and her son could acquire status in Canada through marriage and sponsorship by her second husband. As such, the IAD found that Mr. He fits the description in s 4.1 of the Regulations and dismissed the appeal.

IV. **Issues and Standard of Review**

[13] In the Applicant's written submissions, she argued that the Decision was vitiated by a reasonable apprehension of bias, based on the member's questioning of the Applicant at the hearing before the IAD. However, at the hearing of the application for judicial review, the Applicant's counsel advised that he was not pursuing that argument. As such, the sole issue raised by the Applicant for the Court's consideration is whether the Decision was reasonable.

[14] As suggested by this articulation of the issue, the applicable standard of review is reasonableness.

V. **Analysis**

[15] As the Applicant submits, s 4.1 of the Regulations applies when three conjunctive elements are present (see *Fang v Canada (Citizenship and Immigration)*, 2020 FC 851 at para 13). In relation to the circumstances of the present case, these elements are:

A. The Applicant and Mr. He had a previous marriage;

B. The previous marriage was dissolved primarily so that the Applicant, Mr. He, or another foreign national could acquire immigration status or privilege in Canada; and

C. The Applicant and Mr. He subsequently began a new conjugal relationship.

[16] The Applicant also submits, and I agree that, as the genuineness of the relationship between the Applicant and Mr. He is not in issue, the question for the IAD to determine was whether the divorce between the Applicant and Mr. He was a "divorce of convenience."

[17] In support of her position that the Decision is unreasonable, the Applicant submits that there was ample evidence before the IAD that her first marriage with Mr. He had broken down over the years, as they grew apart and became incompatible. She identifies this evidence in detail and argues that the IAD arrived at its Decision without taking this evidence into account.

[18] I do not find this argument persuasive, as it represents an attempt to have the Court reweigh the Applicant's evidence, which is not the Court's role in a judicial review application (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 125). Many of the Applicant's arguments in this application similarly amount to submissions that

the IAD should have arrived at a different decision based on the evidence. Such arguments do not raise a basis for the Court to interfere with the Decision.

[19] However, the Applicant also focuses on certain specific findings in the Decision and submits that these findings are hyperbolic, or otherwise inconsistent with the evidence.

[20] First, the Applicant refers the Court to the IAD's finding that she did not produce any evidence to establish that she had ever cohabited with her second husband, Mr. Zhou, or had ever lived apart from Mr. He prior to settling in Canada. The Applicant submits that this finding is inconsistent with the evidence that she lived with Mr. Zhou in China from February 2005 until her departure for Canada in March 2007. She argues that this error represents a break in the IAD's chain of analysis, rendering the Decision unreasonable.

[21] In my view, the impugned finding must be read in the context of the previous paragraph of the Decision, in which the IAD recounted the Applicant's testimony that she moved in with Mr. Zhou two weeks after her divorce from Mr. He. In canvassing this evidence, the IAD found that the Applicant's explanation for the breakdown of her first marriage stretched credulity. The Decision demonstrates that the IAD struggled with the Applicant's explanation that, even though her son visited her from boarding school on weekends, Mr. Zhou was often away on business and she was therefore able to hide the fact that she had remarried from her son.

[22] It is clear from that analysis that the IAD did not overlook the Applicant's evidence that she resided with Mr. Zhou during this period. In the context of that analysis, the IAD's finding

that she did not produce any evidence to establish this fact must be interpreted as a reference to the absence of any evidence other than her testimony, which the IAD found wanting in credibility.

[23] Next, the Applicant takes issue with the IAD's finding that Mr. He provided significant financial support to the Applicant from the time that she returned to Canada with their son in 2009. The Applicant disputes this finding, arguing that the only evidence of financial support prior to the Applicant remarrying Mr. He in 2011 was the provision of funds to purchase a car for the son's transportation to school. While Mr. He subsequently funded the purchase of a property, this was not until after the remarriage.

[24] The Respondent responds to this argument by pointing out that, in a letter written in support of her application to sponsor Mr. He for immigration to Canada, the Applicant referred to Mr. He purchasing what the Applicant and their son needed, every time they went back and forth between China and Canada, as well as giving the Applicant financial assistance with her life in Canada. I agree with the Respondent that, in the context of this evidence, the finding surrounding financial support is reasonable.

[25] The Applicant also advances an argument that the IAD erred by relying on a stereotype in the Decision. This argument is based on the following passage of the Decision, in which the IAD was commenting on the time that elapsed before the Applicant sponsored Mr. He for immigration to Canada:

> … I do not find that the delay in sponsorship is a significant contraindication that the marriage between the Appellant and the

> Applicant was dissolved primarily for an immigration purpose. The Appellant explained that the Applicant wanted to remain in China so that he could continue working and supporting her and her son financially until retirement. I do not find that this is an unusual arrangement in the context of immigration of families from China, or is inconsistent with their marriage being dissolved so that the Appellant could acquire status in Canada, and subsequently bring her son to Canada. …
>
> [Emphasis added]

[26] The Applicant's submissions do not elaborate upon this argument. However, I accept that reliance on stereotypes can make an administrative decision unreasonable. In *Vavilov*, the Supreme Court explained that the reasonableness of a decision can be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it, including by relying on an irrelevant stereotype (at para 126). However, I find no reviewable error arising from the passage in the Decision on which the Applicant relies. In making the impugned comment, the IAD was accepting the Applicant's explanation of Mr. He's decision to remain in China, although it did not find that explanation inconsistent with the marriage having been dissolved so that the Applicant could acquire status in Canada.

[27] The Applicant also argues that the IAD erred by framing the issue before it as whether the Applicant's first marriage was dissolved primarily so that she and her son could acquire status in Canada, when the finding of the Officer under appeal was that the first marriage was dissolved so that Mr. He could acquire such status. The Applicant recognizes that s 4.1 of the Regulations is broad enough to apply, regardless of whether it was the Applicant, her son or Mr. He who acquired status as a result of a divorce of convenience. However, she submits that, in the

absence of a finding by the Officer that that the divorce was pursued so that she could acquire status, this was not an issue in the appeal before the IAD.

[28] I agree with the Respondent's position on this issue, that the Applicant's argument is premised on what appears to be an error in the letter by which the Officer conveyed the decision that the sponsorship application had been refused. While that letter reads as if the refusal was based on Mr. He's efforts to obtain status in Canada, the GCMS notes, which form part of the reasons for the Decision, indicate that the refusal was on the basis that the marriage had been dissolved for the primary purpose of the Applicant obtaining a benefit. I also agree with the Respondent's submission, again based on the GCMS notes, that the overall tenor of the Officer's interview with Mr. He focused on whether the dissolution was for the purpose of the Applicant obtaining permanent residence in Canada.

[29] Moreover, the Applicant provided no authority for the proposition that, in the absence of a finding by the Officer specific to her efforts to acquire status, it was not available to the IAD to consider that issue on appeal. The IAD's role was to consider the possible application of s 4.1 of the Regulations and, as the Applicant acknowledges, an effort on her part to acquire status through a divorce of convenience falls within the scope of that provision.

[30] As the Respondent notes, the Applicant has not raised this argument as a procedural fairness issue. Rather, she raises it in the context of a submission that the IAD erred by focusing its analysis improperly on whether her marriage to Mr. Zhou was genuine. Again, I agree with the Respondent's argument that an assessment of the genuineness of the Applicant's relationship

with Mr. Zhou was relevant to the required determination under s 4.1. As explained in *Li v Canada (Citizenship and Immigration)*, 2019 FC 1544 at para 64, the divorce in question cannot be looked at in isolation, because the context includes the series of events that followed the divorce. This includes the Applicant's relationship with Mr. Zhou.

[31] Finally, I note that, in the course of her submissions, the Applicant identified the fact that, during the hearing of the appeal, the Minister's counsel made concessions that would be consistent with accepting the Applicant's credibility in asserting that her divorce from Mr. He and marriage to Mr. Zhou were genuine. However, as the Respondent argues, the submissions of the Minister's counsel are not binding on the IAD, which is tasked with assessing the evidence before it. Moreover, the record demonstrates that the Minister's counsel's submissions were premised on the Applicant being found credible, and it is clear from the Decision that the IAD found the Applicant wanting in credibility.

[32] Having considered the Applicant's arguments, I find the Decision reasonable and must therefore dismiss this application for judicial review. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-1329-20

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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