Federal Court  Cour fédérale

Date: 20210716

Docket: IMM-1968-20

Citation: 2021 FC 747

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 16, 2021

PRESENT: The Honourable Mr. Justice McHaffie

BETWEEN:

AICHA BENZINA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Aicha Benzina attempted to sponsor her husband, Ayoub Chemlal, a citizen of Morocco. The Immigration Appeal Division (IAD) found that they were not credible, and that the intent of their marriage was primarily to acquire status in Canada, contrary to subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. Ms. Benzina seeks

judicial review of this decision. She alleges that the many negative inferences drawn by the IAD with respect to her credibility and that of Mr. Chemlal were unreasonable.

[2] I conclude that the IAD's decision was reasonable. Although the IAD erred in drawing a negative inference from its finding that Ms. Benzina and Mr. Chemlal spoke to each other during a break in the hearing despite the absence of an order to exclude witnesses, this error was not determinative. The other credibility findings were reasonable and determinative of the appeal.

[3] Further, I find that the IAD did not deal with this appeal in bad faith. I am taking this opportunity to stress that an allegation of bad faith is a serious charge that should not be made lightly.

[4] Accordingly, the application for judicial review is dismissed.

II. Issues and standard of review

[5] I agree with the Minister that Ms. Benzina's claims raise two issues:

A. Did the IAD err in concluding that Ms. Benzina and Mr. Chemlal were not credible and that the marriage was entered into primarily for the purpose of acquiring a status or privilege under the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*]; and

B. Did the IAD violate the rules of procedural fairness by acting in bad faith?

[6] The first issue must be reviewed on a standard of reasonableness: *Canada (Minister of Citizenship and Immigration v. Vavilov*, 2019 SCC 65 at paras 23–25; *Bourassa v. Canada (Citizenship and Immigration)*, 2020 FC 805 at para 23. Under this standard, the Court determines whether the decision is internally coherent, justified, transparent and intelligible in light of the record before the decision maker and the submissions of the parties: *Vavilov* at paras 99, 105–107, 125–128. Deference is owed to credibility determinations of witnesses, but the reasonableness of a decision can be compromised if the decision maker has misunderstood or disregarded the evidence: *Wang v. Canada (Citizenship and Immigration)*, 2011 FC 969 at paras 22–23; *Vavilov* at para 126.

[7] The second issue, being a matter of procedural fairness, must be reviewed on a standard of correctness, or no standard of review: *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, 2018 FCA 69 at paras 54–56. In this analysis, the Court determines whether the procedure was fair in light of all the circumstances.

III. Analysis

A. *The IAD's decision was unreasonable.*

(1) The sponsorship application and the refusals by the visa officer and the IAD

[8] Ms. Benzina left Morocco for Canada in 2005 when she married and was sponsored by her first husband. In 2008, she gave birth to their son, and the couple divorced in 2010.

Ms. Benzina remarried and sponsored her second husband in 2010 and 2011, but he was abusive, and they divorced in 2015.

[9] In July 2016, Ms. Benzina was visiting Morocco with her son when she met Mr. Chemlal. They became a couple in the summer of 2016 before Ms. Benzina returned to Canada in September and they discussed their intention to marry in the future. They continued to communicate long-distance and became engaged in early 2017. Ms. Benzina returned to Morocco in May 2017 to celebrate the engagement and again in November 2017 for the wedding ceremony. In December 2017, Ms. Benzina filed an application to sponsor Mr. Chemlal.

[10] Following an interview with Mr. Chemlal by a visa officer, the sponsorship application was refused on February 1, 2019. The officer was [TRANSLATION] "not satisfied that this is a bona fide relationship." The reasons for the refusal were that (i) Mr. Chemlal demonstrated superficial knowledge of Ms. Benzina's family and her previous marriages; (ii) he demonstrated limited involvement in Ms. Benzina's life; (iii) it is less common in Morocco for a young man to marry a woman on her third marriage (especially since Mr. Chemlal is eight years younger than Ms. Benzina); (iv) the wedding photos appear to have been arranged solely for the sponsorship application; (v) Mr. Chemlal could not describe the progression of the relationship or the couple's short- or long-term plans; and (vi) the marriage appears to have been arranged so that Mr. Chemlal could obtain status in Canada.

[11] Ms. Benzina filed an appeal with the IAD, which held a hearing in December 2019. The IAD denied that appeal on the basis that Ms. Benzina [TRANSLATION] "has not established on a

balance of probabilities that her marriage to [Mr. Chemlal] was not entered into primarily for the purpose of acquiring status or privilege under the IRPA."

[12] The IAD based its decision on the lack of credibility of Ms. Benzina and Mr. Chemlal. The IAD drew negative inferences about their credibility for several reasons. First, it concluded that Mr. Chamlal benefitted from the details of Ms. Benzina's testimony during a break in the hearing, which [TRANSLATION] "seriously undermines his credibility as well as the probative value of any corroborating information that he provided at the hearing." The IAD then noted a discrepancy between the forms and the testimony as to the number of guests at the engagement and wedding and did not accept the couple's explanations on this point. It also drew a negative inference from Mr. Chemlal's failure to disclose in his sponsored application two prior applications for study permits that had been refused and his erroneous and contradictory testimony about these applications.

[13] In its findings, the IAD noted that Mr. Chemlal made sustained attempts to come to Canada before he met Ms. Benzina. It pointed out the contradictions in the evidence and did not accept that they were mistakes made by their consultant, as the couple had argued. The IAD concluded that the contradictions sufficiently undermined the credibility of the couple:

> Even when glossing over the conclusion that there was an exchange of information involving the appellant's oral testimony with the applicant before he testified, the credibility findings lead the panel to find that he gave testimony lacking in credibility.
>
> [Emphasis added.]

[14] The IAD therefore found that Ms. Benzina did not discharge her burden of showing that her marriage to Mr. Chemlal was not entered into for primarily of the purpose of acquiring status or privilege under the IRPA.

(2) The IAD erred in undermining Mr. Chemlal's credibility on the basis that he communicated with Ms. Benzina or her counsel during the break

[15] The IAD based its conclusion that Mr. Chemlal received information about Ms. Benzina's testimony on four aspects of the hearing. It noted that (i) Ms. Benzina and her counsel were late after the meeting; (ii) Mr. Chemlal's responses appeared [TRANSLATION] "at times to have been telegraphed based on the testimony" of Ms. Benzina; (iii) Mr. Chemlal responded to a question that Ms. Benzina had also been asked by saying [TRANSLATION] "as you know"; and (iv) Mr. Chemlal immediately identified in detail errors in the information regarding the number of guests at the engagement party and the wedding ceremony. Ms. Benzina argues that it was unreasonable for the IAD to base such a finding on these facts.

[16] In my view, it was not unreasonable for the IAD to find, as a question of fact, that there were exchanges during the break in question. Contrary to Ms. Benzina's submissions, the IAD did not err with respect to the length of the break. Based on the transcript of the hearing, the IAD referred to the 20-minute morning break, not the lunch break as claimed by Ms. Benzina. Who requested the break is irrelevant.

[17] With respect to the use of the phrase [TRANSLATION] "as you know," I am aware that such terms are often used as an expression and should not necessarily be taken literally.

However, Mr. Chemlal explained that he used the expression [TRANSLATION] "[b]ecause my wife and [her counsel] were there listening." The IAD is in a better position than the Court to make credibility findings as to the testimony, and I cannot conclude that the IAD erred in rejecting this explanation as inadequate and not credible: *Barm v. Canada (Citizenship and Immigration)*, 2008 FC 893 at paras 11–12; *Vavilov* at para 126. Having reviewed the transcript, I cannot conclude that the IAD's assessment of the nature of Mr. Chemlal's testimony was unreasonable.

[18] That said, in my view the issue is not ultimately whether the IAD erred in drawing the inference that Mr. Chemlal communicated with Ms. Benzina or her counsel during the break. Rather, the issue is whether the IAD erred in undermining Mr. Chemlal's credibility on this basis, especially without asking him. I find that it erred in this respect.

[19] As an administrative tribunal and court of record, the IAD has the power to exclude witnesses from its hearings: *IRPA*, s 174. Under section 41 of the *Immigration Appeal Division Rules*, SOR/2002-230 [Rules], a person must not communicate *to a witness excluded from a hearing room* any testimony given while the witness was excluded until that witness has finished testifying.

[20] If an order excluding witnesses is violated, the court may determine the impact of the violation: *Rivait v. Monforton*, 2007 ONCA 829 at para 6. This may include a negative inference on credibility, namely an inference raised by the witness's failure to comply with the oath and promise to tell the truth: *Patio v. Canada (Citizenship and Immigration)*, 2020 CanLII 24499 (CA IRB) at para 13; *Li v. Canada (Citizenship and Immigration)*, 2011 CanLII 87474 (CA IRB)

at para 7, citing *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA). The presumption of truth of witnesses may be undermined when witnesses do not comply with the IAD's instructions regarding testimony: *Li* at para 7.

[21] In the case at bar, however, there is no indication in the record that the IAD issued an order excluding witnesses in general or Mr. Chemlal in particular. Section 41 of the Rules specifies that the prohibition on communicating applies to witnesses excluded from a hearing room. In the absence of such an exclusion, Ms. Benzina was not prohibited by the Rules from communicating with Mr. Chemlal, and he was not prohibited from communicating with her. Further, the IAD did not inform or instruct Ms. Benzina or Mr. Chemlal that they were prohibited from communicating the substance of their testimony during breaks. Drawing a negative inference as to their credibility because of such a communication is not reasonable in these circumstances.

[22] In this regard, if the IAD wishes to exclude witnesses and/or prohibit them from communicating, it should "provide both the Appellant and the witness with specific instructions on the record regarding communication between the sittings" and that the witnesses must be "identified and excluded at the outset of a hearing to ensure that their testimony is not influenced by prior testimony," as the Refugee Appeal Division requires the Refugee Protection Division to do in the context of its equivalent power to exclude: *X(RE)*, 2014 CanLII 90919 (CA IRB) at para 36; *X(RE)*, 2014 CanLII 90769 (CA IRB) at para 21; *Refugee Protection Division Rules*, SOR/2012-256, s 48.

[23] This conclusion is not affected by the fact that Mr. Chemlal was not present in the hearing room and instead testified by telephone. An order excluding witnesses simultaneously removes witnesses from the hearing room so they cannot hear the testimony of others and triggers the section 41 communication ban. In today's litigation setting, where courts and tribunals often hear evidence via telecommunication, it is appropriate to recognize that the courtroom may have "virtual" aspects and that witnesses may be excluded from the "hearing room" even if they are not physically "in" the room.

[24] Lastly, I note that the IAD's finding was based merely on the communication and not on a denial of communication that was not credible. The IAD did not put the question to Mr. Chemlal to allow him to deny, admit or explain it. Instead, the IAD simply considered that Mr. Chemlal lacked credibility because he failed to follow instructions that were never communicated to him. It was unreasonable to consider that Mr. Chemlal lacked credibility on that basis.

(3) The previous error was not determinative.

[25] Although the IAD erred in drawing a negative inference on Mr. Chemlal's credibility from its determination that there had been exchanges between the witnesses during the break, on a reading of the IAD's decision as a whole, this failure is not sufficiently crucial or significant to render the decision unreasonable: *Vavilov* at paras 85, 100.

[26] As reproduced in paragraph [13] above, the IAD stated that "even when glossing over" its conclusion that there was an exchange of information, its other credibility findings are

sufficient to conclude that Mr. Chemlal lacked credibility. Ms. Benzina argues that the IAD's decision reveals that its finding based on the sharing of testimony affects the overall reasoning and undermines its other conclusions. I disagree. The IAD's statement that the other credibility findings were sufficient to undermine Mr. Chemlal's credibility is clear. It should be accepted unless there are other indications in the reasons that undermine that statement. Contrary to Ms. Benzina's claims, I find none.

[27] That being the case, the IAD's decision is reasonable if the other negative credibility inferences on which the decision is based are reasonable. For the following reasons, I find that they are.

(4) The IAD did not err in its assessment of the discrepancy in the number of guests at the engagement and wedding.

[28] I find nothing unreasonable about the negative inference drawn by the IAD regarding the inconsistencies in the number of guests at the engagement and wedding. The IAD noted that in the "Sponsorship Evaluation and Relationship Questionnaire" completed by Ms. Benzina and Mr. Chemlal, they indicated that there were six guests at their engagement celebration and twelve guests at their wedding ceremony. When interviewed by the visa officer, Mr. Chemlal repeated that there were twelve guests at the wedding. The IAD stated that this number of wedding guests was consistent with the wedding photos submitted in the sponsorship application. However, at the hearing before the IAD, Ms. Benzina and Mr. Chemlal told the IAD that there were twelve guests at their engagement celebration and around sixty at their wedding.

[29] At the hearing before the IAD, Ms. Benzina and Mr. Chemlal explained that the consultant who helped them prepare their application probably mixed up the dates of the events and the number of guests. The IAD rejected this explanation since Ms. Benzina and Mr. Chemlal signed the form indicating that its contents—including the number of guests—were true, complete and accurate. Further, the IAD noted that the wedding photos appear to have been taken for the sole purpose of demonstrating the authenticity of the wedding, that they show only a dozen guests and that Mr. Chemlal stated in his interview with the visa officer that there were only a dozen guests.

[30] The IAD clearly weighed the inconsistencies in the case and the explanation given by Ms. Benzina and Mr. Chemlal and found it insufficient. Its conclusion was justified, transparent and intelligible in light of the evidence before it, and therefore reasonable: *Vavilov* at paras 99-101.

(5) The IAD did not err in its assessment of Mr. Chemlal's previous applications for study permits

[31] Mr. Chemlal applied for study permits in Canada in May 2015 and April 2016, which were refused. However, he did not disclose these refusals in his sponsorship application, and answered "No" to the question of whether he had [TRANSLATION] "ever been refused refugee status, or an immigrant or permanent resident visa (including a *Certificat de sélection du Québec (CSQ)* or application to a Provincial Nominee program) or visitor or temporary resident visa, to Canada or any other country." In his interview with the visa officer, Mr. Chemlal admitted that

he had twice been refused a study permit, but at the IAD hearing he stated that he had applied for these study permits in 2012 and 2015 instead of 2015 and 2016.

[32] When the IAD asked Mr. Chemlal to explain this contradiction, he claimed that the error in the form was made by the consultant and [TRANSLATION] "that he knew the Canadian authorities would have the past refusals on file and that he had no reason to lie." He went on to explain that he believed that he had initially applied for a study permit in 2012, immediately after obtaining his bachelor's degree in Morocco.

[33] The IAD did not accept these explanations. It dismissed the argument that the error in the form was the consultant's on the same grounds that it dismissed the same explanation as to the number of guests at the engagement celebration and wedding ceremony. Mr. Chemlal signed this form, attesting to its truthfulness. Further, the IAD noted that Mr. Chemlal appeared to have realized the error prior to the IAD hearing but never corrected it.

[34] The IAD also did not accept the explanation that Mr. Chemlal had no reason to lie because the Canadian authorities had this information. The fact that he was refused two study permits is material to the question of whether the marriage was bona fide under subsection 4(1) of the IRPR. As a result, someone seeking to be sponsored by his or her spouse might be motivated to avoid disclosing previously denied permits.

[35] The IAD rejected his explanation with respect to his application for a study permit in 2012 instead of 2016. The IAD noted that this was a difference of several years, not months, and

that the two study permit applications were refused barely eleven months apart. Moreover, the last study permit application was refused just three months before Mr. Chemlal met Ms. Benzina. Further, the IAD noted that Mr. Chemlal had no knowledge of her plans to study in Canada.

[36] The IAD provided a clear rationale for not accepting Mr. Chemlal's explanations. It also clearly explained why these contradictions undermined Mr. Chemlal's credibility and why, accordingly, the IAD determined that the primary intent of the marriage was the acquisition of status in Canada. The decision was justified, transparent and intelligible.

B. *There is no indication that the IAD acted in bad faith*

[37] Ms. Benzina alleges that the IAD, in accusing the couple of communicating during the break, acted in bad faith, thereby breaching the rules of procedural fairness. I disagree. There is an important distinction between an error made by an administrative tribunal and bad faith. In the case at bar, there is no indication that the IAD's findings, or its error, were made in bad faith.

[38] Ms. Benzina's written submissions suggest that a [TRANSLATION] "plain reading of the decision along with the transcript of the relevant segments of the recording of the hearing in question clearly indicate that the tribunal was acting in bad faith, the evidence is overwhelming." No further details are provided on this point. Having read the transcript and the decision, I do not agree that it indicates—"clearly" or not—that the tribunal acted in bad faith.

[39] At the hearing of the application for judicial review, counsel for Ms. Benzina relied primarily on the fact that the IAD accused him of having requested the break during which there

was an alleged exchange, even though he was not the one who requested it. As I noted above, Ms. Benzina is mistaken in referring to the noontime break instead of the morning break. Just before 11 a.m., the Member asked if Ms. Benzina's counsel wanted to take a break. He replied that he did. I do not see any error in that, nor any relevance. In any event, a mistake about who asked for the break could not be sufficient evidence of bad faith.

[40] There is a presumption of impartiality and of good faith on the part of the IAD: *Freeman v. Canada (Citizenship and Immigration)*, 2013 FC 1065 at para 25, citing *La Ville Saint-Laurent v. Marien*, [1962] SCR 580 at p. 585. The Supreme Court of Canada required that bias denote a state of mind that is in some way predisposed to a certain result or closed on certain issues and that the applicable test is to ask whether "an informed person, viewing the matter realistically and practically" would be likely to believe that the decision maker, "whether unconsciously or unconsciously, would not decide fairly": *R v. S (R.D.)*, [1997] 3 SCR 484 at paras 31, 105. The threshold is very high: *Fouda v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1176 at para 23, citing *Zhu v. Canada (Citizenship and Immigration)*, 2013 FC 1139 at para 2 and *AB v. Canada (Citizenship and Immigration)*, 2016 FC 1385 at para 141. Ms. Benzina's allegations fall far short of this threshold.

[41] I conclude by reiterating that an allegation of bad faith by a tribunal is a serious allegation. It goes to the heart of the tribunal's functions and its ability to act impartially. It should not be raised lightly or without a substantial basis. In my view, the allegation should not even have been raised in this case.

IV. Conclusion

[42] The IAD considered Ms. Benzina and Mr. Chemlal lacked credibility, and concluded that the primary purpose of their marriage was to acquire status in Canada in a reasonable manner. Further, the IAD did not breach the rules of procedural fairness when it found that Ms. Benzina's testimony had been disclosed to Mr. Chemlal.

[43] Accordingly, the application for judicial review must be dismissed. Neither party proposed a question for certification, and I find that none arises in this case.

[44] Finally, for the sake of consistency and in accordance with subsection 4(1) of the IRPA and Rule 5(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, the style of cause is amended to designate the Minister of Citizenship and Immigration as respondent.

JUDGMENT in IMM-1968-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The style of cause is amended to name the Minister of Citizenship and Immigration as the respondent

"Nicholas McHaffie"
Judge

Certified true translation
This 29th day of July 2021.

Elizabeth Tan, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1968-20
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