

Federal Court



Cour fédérale

Date: 20220419

Docket: IMM-411-21

Citation: 2022 FC 547

Ottawa, Ontario, April 19, 2022

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

YANET ILLAS FERRERA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada (the “IAD”), dated December 30, 2020, dismissing the Applicant’s appeal and upholding a visa officer’s refusal to approve the Applicant’s sponsorship of her spouse for permanent residency (the “Decision”).

II. Background

[2] The Applicant, Yanet Illas Ferrera, is a 48-year-old female Canadian citizen of Cuban descent.

[3] On March 29, 2017, while on vacation in Cuba, the Applicant met the then 20-year-old, Mr. Miguel Enrique Gonzalez Rodriguez. Following two additional trips to Cuba in August and December 2018 (when the couple got engaged), the couple married on April 16, 2018 in a civil ceremony in Cuba. This was the Applicant's third marriage and Mr. Gonzalez Rodriguez's first marriage.

[4] The Applicant has been unemployed since November 2013 as a result of an accident and has been receiving Long Term Disability benefit payments since February 20, 2014.

[5] In 2016, the Applicant was diagnosed with lung cancer. She declined surgical intervention at that time due to mental health issues (*i.e.*, depression and anxiety). In July 2021, it was discovered that her cancer had metastasized resulting in a terminal medical diagnosis. The Applicant has since completed a palliative course of radiation therapy and continues to receive chemotherapy.

A. *The Applicant's Sponsorship Application*

[6] In September 2018, the Applicant submitted an application to sponsor Mr. Gonzalez Rodriguez's application for permanent residence under the Spouse or Common Law Partner in Canada class.

[7] On January 8, 2020, Mr. Gonzalez Rodriguez attended an interview at the Immigration, Refugees, and Citizenship Canada (IRCC) office at the Port of Spain. At the interview, he could not identify the date of marriage correctly; he had limited knowledge of the Applicant, including her interests, hobbies, friends, history, and past relationships, including the number of times she had been married; and he could not articulate the content of their conversations and communication between them.

[8] By letter dated January 16, 2020, the visa officer refused Mr. Gonzalez Rodriguez's application for permanent residence. Based on their assessment of the application, supporting documents, and interview, the visa officer was not satisfied that the marriage between the Applicant and Mr. Gonzalez Rodriguez was genuine or that it was not entered into primarily for the purpose of acquiring permanent residence in Canada contrary to subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "IRPR").

[9] The Applicant appealed the visa officer's refusal and a hearing was held on November 13, 2020.

[10] The IAD dismissed the appeal in the Decision, dated December 30, 2020. The Applicant seeks:

- i. An Order in the nature of *certiorari* to set aside the Decision of the IAD;
- ii. An Order in the nature of *mandamus* directing the IAD to reconsider the matter;
- iii. Costs; and
- iv. Such further and other relief as this Honourable Court deems just.

III. Decision Under Review

[11] After hearing the testimony and submissions and reviewing the documentary materials, the IAD found that the Applicant had not met the onus of proving that her marriage with Mr. Gonzalez Rodriguez was genuine and not entered into primarily for immigration purposes for the following reasons:

- i. There were significant inconsistencies and gaps in the evidence for which satisfactory explanations were not provided;
- ii. While the couple were able to provide accurate details about several areas of each other's lives, there were other areas where knowledge gaps were significant and not to the level that would be expected in a relationship of this length. For example, there were gaps in knowledge and inconsistencies regarding the Applicant's relationship with her son and her son's ability to support her; the Applicant's mental health issues; and the Applicant's accident in 2013.

Collectively, the gaps and inconsistencies demonstrated the couple's superficial knowledge and raised serious questions about credibility and knowledge, especially given the extent of the couple's alleged daily communication.

- iii. There were gaps in the testimony regarding the genesis of the relationship. For example, the couple were not credible in explaining the circumstances of how the relationship began; significant events, such as meeting family, who proposed marriage, wedding ceremonies, and religious conversion ceremonies; and Mr. Gonzalez Rodriguez's termination/resignation as a police officer in Cuba.

Some of the gaps and credibility issues were not resolved by the end of the hearing.

- iv. There were concerns about the couple's compatibility. Specifically, their relationship histories and 22-year age gap, and that the couple were unwilling to address the issues.
- v. The couple could not articulate consistent future plans if the appeal were to be unsuccessful and, on a balance of probabilities, the responses did not demonstrate that the couple planned to live together.
- vi. There was some positive and consistent testimony. However, when weighed in the context of the entire record, it did not outweigh the significant concerns raised.

[12] The IAD concluded that there was no single piece of evidence in the appeal that was determinative. It found that, when all the relevant evidence was weighed on a balance of

probabilities, the Applicant had not met her onus on subsection 4(1) of the *IRPR* and the marriage was not genuine.

[13] Given the IAD's finding of a lack of genuineness in the marriage, it did not find it unnecessary to determine the primary purpose for the application for principal residence status.

[14] The appeal was dismissed.

IV. Issues

[15] The issues to be decided on this judicial review are:

(1) Was the Decision procedurally fair?

(2) Was the Decision reasonable?

V. Standard of Review

[16] Where a Court reviews the merits of an administrative decision, the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paragraph 23).

[17] Issues that relate to a breach of procedural fairness are reviewed on the standard of correctness or a standard with the same import (*Canadian Pacific Railway Company v Canada*

(Attorney General), 2018 FCA 69 [CP] at paragraphs 34-35 and 54-55, citing *Mission Institution v. Khela*, 2014 SCC 24 at paragraph 79).

VI. Analysis

A. *Preliminary issue – admissibility of affidavit evidence*

[18] On an application for judicial review, the evidentiary record is usually limited to what was before the administrative decision-maker (*Rosianu v. Western Logistics Inc.*, 2021 FCA 241 [Rosianu] at paragraph 28).

[19] There are three exceptions to this rule and affidavits may be received by the Court i) to provide background information that may assist in the understanding of the relevant issues, ii) to provide material information necessary to determine whether there has been a breach of procedural fairness, and/or iii) to highlight the lack of evidence before the decision-maker when it made its decision (*Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraph 20).

[20] Moreover, the general principles applicable to affidavit evidence (specifically, in this context, *Rule 81(1)* of the *Federal Courts Rules*, SOR/98-106) provide that such evidence cannot consist of arguments, opinions, or hearsay. As well, the evidence must be relevant to an issue properly before the Court (*Rosianu* at paragraph 29).

[21] Both Parties have filed affidavit evidence and challenge the admissibility of the other Party's evidence.

[22] The Applicant swore an affidavit with accompanying exhibits dated May 13, 2021 (the "Applicant's Affidavit"). I find that paragraphs 5-14, 16, and 19 to 33 of the Applicant's Affidavit (including Exhibit "B") are inadmissible. These paragraphs are made to support the Applicant's personal opinion and/or argument. Moreover, these paragraphs of Applicant's Affidavit do not fall into any of the three exceptions outlined above.

[23] Given the issues raised regarding the translation at the hearing by both Parties, paragraph 3 (including Exhibit "A") is admissible because it provides background information that may assist in the understanding of the relevant issues, and it provides material information necessary to determine whether there has been a breach of procedural fairness. Paragraphs 1, 2, 4, 15, 17, and 18 are simply facts that are not in dispute and are allowed but add little to the evidence already before the Court.

[24] The Respondent filed an affidavit sworn by Linda Splawinski dated February 28, 2022 with accompanying exhibits verifying the translation (the "Splawinski Affidavit"). I find that the Splawinski Affidavit is admissible in its entirety because it provides background information that may assist in the understanding of the relevant issues, and it provides material information necessary to determine whether there has been a breach of procedural fairness.

B. *Was the Decision procedurally fair?*

[25] Rule 18 of the *Immigration Appeal Division Rules*, SOR/2002-230, provides for interpretation at an appeal hearing.

[26] The interpretation provided to applicants before the decision-maker must be continuous, precise, competent, impartial, and contemporaneous (*R v. Tran*, [1994] 2 SCR 951 [*Tran*] at paragraph 57; *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191 [*Mohammadian*] at paragraph 4).

[27] If interpretation is required at a hearing, it must be adequate, but need not rise to a standard of perfection or flawlessness (*Mohammadian* at paragraph 6; *Agudelo v. Canada (Citizenship and Immigration)*, 2022 FC 355 [*Agudelo*] at paragraph 27). The fundamental value to be served is “linguistic understanding.” The purpose is to create a level and fair playing field, not to provide some individuals unfair advantages or more rights than others (*Tran* at pp. 977-978; *Mohammadian* at paragraphs 6 and 16).

[28] An applicant alleging inadequate translation is not required to demonstrate actual prejudice (*Mohammadian* at paragraph 4). However, the applicant must show that the interpretation errors were consequential (*i.e.*, they must be real, significant, serious, or non-trivial), connected to the decision maker’s findings, and related to the applicant’s ability to answer questions or present their case (*Paulo v. Canada (Citizenship and Immigration)*, 2020 FC 990 at paragraphs 28 to 29; *Agudelo* at paragraph 28).

[29] Finally, concerns with the interpretation must be raised at the first opportunity before the IAD, consistent with the general principles of procedural fairness (*Mohammadian* at paragraph 13 and 19; *Agudelo* at paragraph 29; *CP* at paragraph 68).

[30] The Applicant argues that her right to procedural fairness was breached due to the failure of the interpreter to properly and competently translate Mr. Gonzalez Rodriguez's testimony at the IAD hearing.

[31] The Applicant states that the interpreter mistranslated and then "concocted" their own answers to questions regarding the date of the couple's first meeting and the times and dates of the Applicant's visits to Cuba. Thus, the IAD based its negative findings on incorrect translations of material aspects of the couple's relationship. In support of her argument, Exhibit A of the Applicant's Affidavit encloses two translations of the IAD hearing conducted by Calgary Translation Services on March 12, 2021, and April 23, 2021.

[32] In response, Exhibit B of the Respondent's Splawinski Affidavit encloses the translation of the Applicant and Mr. Gonzalez Rodriguez's responses regarding the date of their first meeting, which verify that of the original IAD translation.

[33] All three additional translations raise concerns. The Applicant's translations appear to be incomplete and/or have unexplained gaps. The Respondent's translation is of only two questions and is also incomplete.

[34] Notwithstanding these three additional translations, no audit was conducted of the original hearing translation. Without an audit, it cannot be determined whether the translation was continuous, precise, competent, and contemporaneous. None of the three additional translations addresses these considerations or provides clear evidence to the contrary.

[35] In addition, as stated above, the Applicant has a duty to raise issues of adequate translation at the first opportunity before the IAD. Only the issue with respect to the date that the couple first met was raised at the end of the hearing and appropriate steps were not taken to address this issue as suggested by the IAD at that time or prior to the issuance of the Decision over six weeks later. Instead, the Applicant requested two separate transcripts several months later. As a result, the Applicant has not established her right to object to the IAD translation and, at this late stage, that right is waived.

[36] Furthermore, even if there was a mistranslation with respect to the couple's meeting date, it only explains one of the many inconsistencies and does not address the gaps and omissions with respect to key documents and evidence. The finding with respect to the meeting date was only one in a series of concerns raised by the IAD and was not determinative of the Decision.

[37] The Applicant has not discharged her onus to prove on a correctness standard that there was a breach of procedural fairness.

C. *Was the Decision reasonable?*

[38] The Applicant argues that the IAD's Decision was illogical and contrary to the evidence, specifically its findings that:

- i. The couple gave inconsistent details and there was a knowledge gap regarding the frequency of the Applicant's son's visits;
- ii. The couple gave inconsistent testimony regarding why the Applicant's son could not provide support;
- iii. Mr. Gonzalez Rodriguez could not provide details of why the Applicant's second marriage was unsuccessful;
- iv. The supporting documents failed to include reference to a religious conversion;
and
- v. The date of Mr. Gonzalez Rodriguez's employment termination date.

[39] The IAD thoroughly considered and weighed all the evidence that was before it in determining whether the marriage was genuine in accordance with subsection 4(1) of the *IRPR*.

[40] The IAD cited numerous gaps, inconsistencies, and omissions in the evidence (including those listed above), some of which have not been challenged by the Applicant. Specifically, the Applicant has not challenged the following findings of the IAD:

Mr. Gonzalez Rodriguez's lack of knowledge and inconsistencies regarding how many times the Applicant had previously been married;

The omission of significant details in the application narrative, such as the meeting of the families and the existence of two marriage ceremonies, while other microscopic details were included, which is inconsistent with the subsequent oral evidence;

Mr. Gonzalez Rodriguez's lack of knowledge of the Applicant's mental health issues;

Mr. Gonzalez Rodriguez's lack of knowledge of when the Applicant's life changing accident occurred; and

Gaps in testimony as to how and when the relationship developed to the point of marriage.

[41] While the Applicant attempts to highlight certain elements of the testimony, when read in its entirety (or at least the portions provided), the gaps, inconsistencies, and omissions are determinative. The IAD's concerns and questions regarding credibility based on the entirety of the record before it and the interview was reasonable.

[42] As stated by the IAD, there is not one specific piece of evidence that was determinative, but the totality of the record and unresolved concerns. The IAD weighed the cumulative evidence and made findings of fact that were reasonably open to it.

[43] The Applicant is effectively asking the Court to reweigh the evidence, which is not the Court's role in a judicial review.

[44] The Decision is reasonable and there are no breaches of procedural fairness. This Application is dismissed.

JUDGMENT in IMM-411-21

THIS COURT'S JUDGMENT is that

1. This application is dismissed.
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-411-21

STYLE OF CAUSE: YANET ILLAS FERRERA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

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