Federal Court  Cour fédérale

Date: 20220916

Docket: IMM-4649-21

Citation: 2022 FC 1305

Ottawa, Ontario, September 16, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

EMINE EROGLU
HASAN EROGLU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Emine Eroglu (Ms. "Eroglu") and Hasan Eroglu (Mr. "Eroglu"), seek judicial review of a decision of an Immigration Officer (the "Officer") of Immigration, Refugees and Citizenship Canada ("IRCC") dated June 29, 2021, denying Mr. Eroglu's application to sponsor Ms. Eroglu for permanent residence in Canada pursuant to section 4.1 of the

Immigration and Refugee Protection Regulations, SOR/2002-227 ("*IRPR*"). The Officer found the Applicants had dissolved their marriage so Mr. Eroglu could acquire permanent residence status through a new relationship, only to later sponsor Ms. Eroglu to come to Canada.

[2] The Applicants argue that the Officer breached procedural fairness by not allowing them to respond to credibility concerns and came to a substantively unreasonable decision.

[3] For the reasons that follow, I find that the Officer breached the Applicants' right to procedural fairness and rendered an unreasonable decision that is rooted in harmful stereotypes. I therefore grant this application for judicial review.

II. **Facts**

A. *The Applicants*

[4] Ms. Eroglu and Mr. Eroglu are a married couple and citizens of Turkey. Together, they have three adult children who are all permanent residents of Canada: a daughter, Hava (age 31), and two sons, Mehmet (age 28), and Omer (age 26). The Applicants have known each other since childhood and were married on arrangement on August 11, 1986.

[5] On May 15, 1996, Mr. Eroglu fled Turkey for Canada and claimed refugee protection based on his Kurdish ethnicity. He maintained contact with Ms. Eroglu and his children and sent them money, but distance challenged the couple. In 1999, Mr. Eroglu began a new relationship

with Marlene Dumais (Ms. “Dumais”). Due to the breakdown of their relationship, the Applicants divorced on February 16, 2000.

[6] On March 20, 2000, Mr. Eroglu and Ms. Dumais were married in Montreal. In 2002, Ms. Dumais sponsored Mr. Eroglu and he became a permanent resident of Canada in 2008. The relationship lasted 10 years, but eventually broke down due to Ms. Dumais’ preference for living alone. Mr. Eroglu and Ms. Dumais divorced on June 26, 2009.

[7] Following the divorce, Mr. Eroglu relocated to Toronto and opened a restaurant. In 2011, his children received permanent residence status through Mr. Eroglu’s sponsorship. After they arrived in Canada, the family relocated to Brampton, Ontario.

[8] In March 2013, Ms. Eroglu came to visit her children. Though she stayed in Mr. Eroglu’s home, the couple spent little time together. It was not until another visit in September 2014 that the couple began to reconnect. Ms. Eroglu made subsequent visits to Canada from September 2015 to March 2016, October 2016 to February 2017, and November 2017 to March 2018. During these visits, the couple spent more time together and remained in touch when Ms. Eroglu returned to Turkey. The Applicants’ children were also encouraging them to reconcile.

[9] In May 2018, the Applicants decided to rekindle their romantic relationship and they began living together as a couple. The Applicants remarried in May 2019. They opted to marry at City Hall, as it was their second marriage.

[10] On January 29, 2020, the Applicants submitted the spousal sponsorship application at issue. On January 5, 2021, they were advised the application was being transferred to the IRCC office in Etobicoke for further assessment and that they may be contacted for an interview. The Applicants were not contacted for an interview.

B. *Decision Under Review*

[11] The Officer's decision is located entirely in notes in the Global Case Management System. Due to the nature of the reasons for the decision, I cite the Officer's reasons at length:

> FC1 application received 29/01/2020. This application is refused. Sponsor and [Principal Applicant ("PA")] were initially married in 1986. They grew up in Turkey together and their marriage was arranged through their families. Sponsor came to Canada in 1996. Couple remained together until sponsor filed for a divorce and said divorce was granted in February 2000. Sponsor then entered into a new marriage with Marlene Dumais in March of 2000. An H&C spousal sponsorship was submitted in 2002 and sponsor became a PR of Canada in 2008. Once sponsor became a PR he immediately returned to Turkey and was reunited with his ex-wife and children. Sponsor got divorced from his second wife in 2009. He then submitted sponsorship applications for his three children, who were granted PR status in Canada in 2012. PA applied for her first TRV in 2013 which was granted. Her forms which were included in this application indicate that every time PA came to Canada she resided with ex-husband and children. PA has been entering Canada and leaving regularly since 2013, she has always maintained a valid status in Canada. PA has been residing with sponsor for at least six months a year since children became [permanent residents]. PA and sponsor remarried in 2019. Based on timeline of entire history I am not satisfied that sponsor did not obtain his status in Canada based on convenience. PA and sponsor appear to have deliberately divorced and then remarried for the purposes of immigration. I do not find their relationship pattern to be demonstrative of people who appear to be culturally conservative. I do not find that their explanation (or lack thereof) of their relationship time line to be acceptable. I find the manner

> and circumstance in which the sponsor's initial marriage was dissolved and then resumed to be convenient and orchestrated […]

III. **Issues and Standard of Review**

[12] This application for judicial review raises the following two issues:

A. *Whether the Officer breached procedural fairness.*

B. *Whether the Officer's decision is reasonable.*

[13] The first issue regarding procedural fairness is to be reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 ("*Canadian Pacific Railway Company*") at paras 37-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35). With respect to the second issue, the parties concur that the applicable standard of review of the Officer's decision is that of reasonableness, in accordance with the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*"). I agree. In *Clarke v Canada (Citizenship and Immigration)*, 2022 FC 12 ("*Clarke*"), my colleague Justice Favel recently affirmed the reasonableness standard applies to substantive decisions concerning section 4.1 of the *IRPR* (at paras 22-24).

[14] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13; 75). The reviewing court must determine whether the decision under review, including both its

rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A decision that is reasonable as a whole 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[15] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at para 36).

[16] Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair, having regard to all of the circumstances, including the non-exhaustive factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28 (*Canadian Pacific Railway Company* at para 54).

IV. **Analysis**

[17] Section 4.1 of the *IRPR* states:

New relationship	**Reprise de la relation**
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.

[18] Judicial review decisions involving section 4.1 of the *IRPR* do not arise often in this Court. The most recent jurisprudence on section 4.1 of the *IRPR* is instructive: *Clarke*; *Zheng v Canada (Immigration, Refugees and Citizenship)*, 2021 FC 616 ("*Zheng*"); *Fang v Canada (Citizenship and Immigration)*, 2020 FC 851 ("*Fang*"); *Li v Canada (Citizenship and Immigration)*, 2019 FC 1544 ("*Li*"); *Zhang v Canada (Citizenship and Immigration)*, 2019 FC 1468 ("*Zhang*"); *Mai v Canada (Citizenship and Immigration)*, 2018 FC 304 ("*Mai*"); and *Iyare v Canada (Citizenship and Immigration)*, 2018 FC 180 ("*Iyare*").

[19] In *Fang*, Justice Walker clarified the conjunctive nature of the test under section 4.1 of the *IRPR*:

> [13] Section 4.1 is premised on three conjunctive elements. Rephrasing the three elements, Ms. Chen will not be considered Mr. Fang's spouse pursuant to section 4.1 if:
>
> 1. She and Mr. Fang had a previous marriage, common-law partnership or conjugal partnership;
>
> 2. The previous marriage, common-law partnership or conjugal partnership was dissolved primarily so that Ms. Chen or Mr. Fang could acquire immigration status or privilege in Canada; and
>
> 3. Ms. Chen and Mr. Fang subsequently began a new conjugal relationship.

[20] In all of the above decisions, the Court found the section 4.1 findings to be reasonable and dismissed the applications for judicial review. However, in each case the applicants had opportunities to have their credibility assessed during hearings or interviews conducted by the relevant decision makers. *Clarke*, *Zheng*, *Fang*, *Li*, and *Iyare* all concerned underlying Immigration Appeal Division ("IAD") decisions where the IAD assessed the applicants' credibility and/or the plausibility of their circumstances during hearings. *Zhang* also involved an IAD decision, but centered on an unrelated *res judicata* issue. This Court's decision in *Mai* is the most comparable to the one at issue, wherein this Court was tasked with considering whether there were substantive or procedural issues with an officer's section 4.1 finding. In dismissing the application, the Court in *Mai* focused heavily on the interviewing officer's assessment of the applicant's credibility, including inconsistencies in both the sponsor and his wife's testimonies during their interview, in addition to the officer's relatively detailed findings about the suspicious circumstances of the case. I note that in the case at hand, the Officer's reasons lack the same level of detail as the officer's reasons in *Mai*.

A. *Whether the Officer breached procedural fairness*

[21] The Applicants submit the Officer breached procedural fairness by failing to provide them with an opportunity to respond to the Officer's credibility finding that their marriage is one of convenience, either through an interview or through written submissions. In reaching their conclusion, the Officer inexplicably rejected Mr. Eroglu's sworn testimony, letters from the Applicants' three children confirming their divorce and reconciliation, and supporting statements from Mr. Eroglu's friends describing his renewed interest in his wife in 2018. The Applicants maintain that the only fair way for the Officer to relieve their doubts about the Applicants' credibility and the validity of their evidence would have been to grant them an interview (*Chitterman v Canada (Minister of Citizenship and Immigration)*, 2004 FC 765 at paras 3-5; *Pham v Canada (Minister of Citizenship and Immigration)*, 2005 FC 539 at paras 16-18). The Officer also failed to follow the policy manual IP8 "Spousal or Common-law Partner in Canada Class", which specifies that an officer should exercise procedural fairness in evaluating material concerns when assessing for relationships of convenience.

[22] The Respondent contends that the duty of fairness owed by immigration officers is on the low end of the spectrum. The Officer was not required to notify the Applicants of inadequacies in their application, or to request clarifications or additional information, nor were they required to conduct an interview (*Ntamag v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 40 at paras 8-9; *Ponican v Canada (Citizenship and Immigration)*, 2020 FC 232 at para 23). The Respondent notes that, in order to discourage immigration fraud, both sections 4(1) and 4.1 of the *IRPR* operate as exceptions to the general scheme of the *Immigration and Refugee Protection*

Act, (S.C. 2001, c. 27) ("*IRPA*") which is to permit sponsorship of close family members. In this case, the Respondent maintains that it is unlikely the Applicants would have admitted to marrying each other for immigration purposes, and submits it was open to the Officer to make a new relationship finding based on the circumstances. As such, an interview would not reveal discrepancies with the Applicants' written application, which focused on the timing of Mr. Eroglu's divorce from Ms. Dumai and the resumption of his relationship with Ms. Eroglu – all of which raised concerns regarding the integrity of the immigration system.

[23] Based on the parties' submissions and the jurisprudence, I find that the Officer breached procedural fairness by not providing the Applicants with a chance to respond to the implicit credibility concerns that led to the new relationship finding. The Applicants submitted detailed supporting evidence to explain their relationship timeline, including Mr. Eroglu's affidavit and support letters from their children and friends. The Officer did not explicitly address any of this evidence or explain why it was rejected. If the Officer held doubts about the credibility of the evidence submitted by the Applicants, an interview should have been conducted (*Hakrama v Canada (Citizenship and Immigration)*, 2007 FC 85 at paras 23-24).

[24] The Officer also made no specific findings concerning the relationship timeline (spanning approximately 20 years), or why the circumstances of this case seemed particularly suspicious, other than to note that the timeline is not "demonstrative of people who appear to be culturally conservative". The Officer simply found the Applicants failed to explain the timeline, and that Mr. Eroglu seemed to have dissolved his initial marriage and resumed his marriage with Ms. Eroglu in a convenient and orchestrated manner. In reviewing the Applicants' materials, it is

unclear how the Officer came to this conclusion – one that completely contradicts the supporting evidence – without speaking to the Applicants. The Officer's failure to do so demonstrates a reliance on stereotypical assumptions about how "culturally conservative" people may or may not behave. As discussed further below, I find this troublesome.

[25] I accept the Respondent's position that immigration officers are not typically expected to offer a high degree of procedural fairness. However, the Officer's failure to grant an interview in this case does not accord with past decisions of this Court, which indicate the importance of allowing applicants to testify or respond to credibility concerns that arise from section 4.1 findings. In this unique circumstance, I find the Officer had a heightened duty to engage with the Applicants to help address credibility concerns. As rightly noted by the Applicants, both the *IRPA* and the *IRPR* contain family reunification provisions that codify Canada's human rights obligations towards families. I find that procedural fairness is at the higher end of the spectrum in this case since the decision's effect is to separate a mother and wife from her entire immediate family.

B. *Whether the Officer's decision is reasonable.*

[26] The Applicants submit that the Officer failed to provide adequate reasons to justify the severe decision to separate their family (*Vavilov* at para 133; *VIA Rail Canada Inc v National Transportation Agency*, 2000 CanLII 16275 (FCA) at para 22). The Officer's decision does not address the Applicants' reasons for their divorce, the issues that led to Mr. Eroglu's divorce from Ms. Dumais, or the circumstances that led to their reconciliation. The Applicants argue that the Officer applied baseless assumptions to their relationship timeline and failed to engage with the

evidence on record, as well as the plausibility of the Applicants' circumstances. This Court has found that decision makers must proceed cautiously and rely on common sense or evidence when drawing adverse credibility findings from the implausibility of a claimant's narrative (*Aliserro v Canada (Citizenship and Immigration)*, 2022 FC 412 ("*Aliserro*") at paras 30-31). It was also unreasonable for the Officer to find that Mr. Eroglu reunited with Ms. Eroglu when he returned to Turkey after becoming a Canadian permanent resident, when there is no evidence of the couple's communication or contact during this time. In fact, the evidence demonstrates that the couple had been divorced for several years at this point and barely spent time together when Ms. Eroglu first visited her children in Canada in 2013.

[27] The Applicants further submit that the Officer's broad statements about their cultural conservatism and relationship timeline are entirely speculative and based on stereotypes. The Officer's decision suggests that the relationship is one of convenience because the Applicants are "culturally conservative", yet there was no evidence before the Officer to justify this conclusion. During the hearing, counsel for the Applicants stressed that the Officer's reasoning is tainted by their view of the Applicants as stereotypes, rather than as people.

[28] The Respondent maintains that section 4.1 decisions are "difficult", as applicants are unlikely to admit to abusing the sponsorship provisions and officers are tasked with examining the evidence before them to determine whether such abuse occurred. Based on the Applicants' circumstances and the timeline of their relationship, the Applicants fit within the ambit of section 4.1 of the *IRPR*. The Respondent argues the Officer's reasons are sufficiently clear and the Officer conducted an adequate review of the Applicants' supporting evidence.

[29] This decision is unreasonable and cannot stand. I do not find the Officer's reasons to be intelligible, transparent or justified in light of the ample evidence provided by the Applicants, and I am disturbed by the Officer's reliance on stereotypes to support their conclusion. The Respondent's submissions suggest it was appropriate for the Officer to review the background facts of this case and conclude that the Applicants' relationship is one of convenience because the types of marriages and divorces described under section 4.1 of the *IRPR* occurred in their case. This, however, fails to account for the context of the Applicants' narrative and the supporting evidence on record.

[30] The only unique factor the Officer seems to rely on to support their findings that the Applicants relationship is one of convenience is grounded in a stereotypical assumption about the Applicants' apparent cultural conservatism. The Officer's decision states: "I do not find their relationship pattern to be demonstrative of people who appear to be culturally conservative." As rightly noted by the Applicants, the record does not support this conclusion, nor did the Officer explain the origins of this finding. The Applicants provided a sworn affidavit from Mr. Eroglu and letters from their children and friends outlining their relationship timeline, including the events leading to their initial divorce in 1999, Mr. Eroglu's ten-year relationship with Ms. Dumais, and the Applicants' remarriage in 2019. The Officer did not refer to any of these materials, nor do I find that anything in the record addresses the Applicants' alleged cultural conservatism or any inherent unwillingness to divorce or remarry because of their cultural beliefs. The Officer appears to have reached this conclusion on their own, based on stereotypical beliefs about how the Applicants—and those like them—ought to behave. To be clear, the *Vavilov* framework does not support such a "justification".

[31] Immigration officers do not have the inherent authority to make assumptions about an applicant's personal beliefs—whether they are cultural, religious, or the like. Without any statements from the Applicants on the topic, the Officer had no reasonable basis upon which to conclude they adhered to a culturally conservative lifestyle, or to make assumptions about what that sort of lifestyle would entail. The Officer had the opportunity to ask the Applicants to elaborate on their beliefs during an interview or in a follow-up procedural fairness letter, yet the Officer opted not to take such steps.

[32] Underlying the test for section 4.1 of the *IRPR* is the need for a decision maker to consider whether a previous marriage or partnership, "[…] was dissolved primarily so that the foreign national, another foreign national or the sponsor could acquire any status or privilege under the [*IRPA*]". A determination of this motive requires context, which in turn requires that consideration be given to the unique evidence and facts underlying each case. In other words, intent matters.

[33] The Officer's decision states that the Applicants failed to provide an acceptable explanation for their relationship timeline. However, the record before the Officer included supporting evidence and a detailed narrative explaining the breakdown and reconciliation of their relationship. I therefore find that the Officer failed to meaningfully consider the evidence that contradicts their conclusion, as they were required to do.

[34] I also find that by rejecting the plausibility of the Applicants' relationship timeline, the Officer drew implicit negative credibility findings. This Court recently determined that such

implausibility are best limited to “clearly unlikely” situations, “based on common sense or the evidentiary record” (*Aliserro* at para 31). As rightly noted by the Applicants’ counsel during the hearing, it is human nature for people to move in and out of relationships. Both common sense and a reliance on the evidentiary record are lacking in the Officer’s decision. It is not outside the realm of possibility that a couple would break up due to living in different countries, but reconnect later in life as a result of increased contact, the pull of shared children, and a general renewed interest in one another. If this were truly a fraudulent scheme, it was a lengthy and complicated one that could have been avoided through more expedient immigration pathways. The Officer’s failure to engage with these contextual factors or the evidence in favour of an unexplained stereotypical finding demonstrates a violation of the section 4.1 framework and warrants this Court’s intervention.

[35] While brevity of reasons may be permissible, *Vavilov* does not permit officers to be completely silent on key issues supported by the evidentiary record. Overall, I find that this decision lacks the transparency, intelligibility, and justification required of a reasonable decision—especially one that results in the separation of a family.

V. **Conclusion**

[36] For the reasons above, I find that the Applicants’ rights to procedural fairness were breached and the Officer’s decision to be unreasonable. I therefore grant this application for judicial review. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-4649-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed. The decision under review is set aside and the matter is referred back for redetermination by a different decision-maker.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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