

Federal Court



Cour fédérale

Date: 20221018

Docket: IMM-2861-21

Citation: 2022 FC 1420

Toronto, Ontario, October 18, 2022

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

VAN VU LY

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Van Vu Ly seeks judicial review of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board. The IAD dismissed Mr. Ly's appeal of the refusal of a visa officer [Officer] to grant his application to sponsor his wife, Thuy Van Lam Do, for permanent residence in Canada.

[2] The IAD confirmed the Officer's determination that the marriage was not genuine and entered into primarily for the purposes of immigration, contrary to s 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations].

[3] Mr. Ly is a citizen of Canada, originally from Cambodia. At the time of the spousal sponsorship application he was 53 years old. Ms. Do is a citizen of Vietnam. At the time of the application she was 33 years old. Both have children from previous relationships, as well as a common daughter born in Vietnam on October 5, 2020.

[4] The IAD's adverse credibility findings were reasonable. Its decision was justified, intelligible and transparent, and falls within the range of acceptable outcomes defensible in respect of the facts and law. The application for judicial review is dismissed.

II. Background

[5] Mr. Ly arrived in Canada in 1987 as a refugee. He became a Canadian citizen in 1994.

[6] In 2016, Mr. Ly enlisted his brother's wife to help him find a new spouse. He was introduced to Ms. Do by telephone in August 2017, and they commenced a long distance relationship shortly thereafter.

[7] Mr. Ly proposed to Ms. Do by telephone in October 2017. He then travelled to Vietnam in November 2017, and married Ms. Do in December of that year.

[8] Mr. Ly submitted an application to sponsor Ms. Do in March 2018. The Officer interviewed Mr. Ly and Ms. Do on August 26, 2019, and refused the application on September 4, 2019.

[9] The Officer noted the couple's 20 year age difference, the circumstances surrounding their introduction, the quick development of their relationship, and Mr. Ly's history of family reunification. He had been married twice before, and sponsored both of his previous wives to Canada. His second marriage lasted approximately four and a half years, and ended just four months after his wife attained status as a permanent resident.

[10] The IAD dismissed Mr. Ly's appeal of the Officer's decision, holding that he and Ms. Do had "not adduced sufficient credible evidence to establish that their marriage is genuine and was not entered into primarily to allow [Ms. Do] and her children to obtain PR status in Canada."

[11] The IAD found both Mr. Ly and Ms. Do lacking in credibility, and drew adverse inferences from the following:

- a) the speed with which the relationship progressed from introduction to marriage;
- b) the lack of documentary evidence confirming communication between the parties before the marriage;
- c) the absence of Ms. Do's two sons from the wedding;

- d) Mr. Ly's limited general knowledge of Ms. Do's children;
- e) the discrepancy between the couple's claim that they did not discuss where they would live until after the marriage and Ms. Do's efforts to obtain documents for a Canadian permanent residence application before the wedding;
- f) inconsistent testimony regarding how and when Ms. Do obtained a letter of consent from her first husband to take their children to Canada; and
- g) the lack of reasonable explanations for these inconsistencies.

[12] The IAD acknowledged that Mr. Ly had visited Ms. Do in Vietnam at least three times after the marriage, and they had a child together. There was documentary evidence confirming the parties had maintained contact and communication following the marriage. The IAD accepted that this might demonstrate the relationship had become genuine over time. However, this was insufficient to outweigh its concern that Ms. Do's primary intention when entering the marriage was to obtain an immigration benefit.

III. Issue

[13] The sole issue raised by this application for judicial review is whether the IAD's decision was reasonable.

IV. Analysis

[14] The IAD’s decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 10). The Court will intervene only where “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).

[15] The criteria of “justification, intelligibility and transparency” are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[16] Subsection 4(1) of the Regulations provides as follows:

Family Relationships

Bad faith

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 marriage, common-law partnership or conjugal partnership

(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or

(b) is not genuine.

Notion de famille

Mauvaise foi

4 (1) Pour l’application du présent règlement, l’étranger n’est pas considéré comme étant l’époux, le conjoint de fait ou le partenaire conjugal d’une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas:

a) visait principalement l’acquisition d’un statut ou d’un privilège sous le régime de la Loi;

b) n’est pas authentique.

[17] In *Canada (Citizenship and Immigration) v Moise*, 2017 FC 1004, Justice Yvan Roy confirmed that s 4(1) of the Regulations requires the applicant to demonstrate, on a balance of probabilities, that the marriage is genuine and not entered into primarily for the purpose of acquiring immigration status. The genuineness of the marriage is evaluated at the time of the visa officer's decision. The intent behind the marriage is evaluated as of the time of the wedding (at paras 15-16):

[...] Indeed, a marriage is disqualified if either of the conditions set out in paragraphs 4(1)(a) and (b) is not met (*Mahabir v. Canada (Citizenship and Immigration)*, 2015 FC 546 and *Singh v. Canada (Citizenship and Immigration)*, 2014 FC 1077). In other words, the [applicant] must meet both conditions. A marriage entered into for the purpose of acquiring a status or privilege will be flawed even if it subsequently becomes genuine. As well, a marriage that is validly entered into can become flawed for immigration purposes if it loses its genuineness.

On its face, the provision sets forth two different times when evaluations must be conducted. Regarding the genuineness of the marriage, the Regulations use the present tense, meaning that the genuineness of the marriage is evaluated at the time of the decision. On the other hand, the evaluation of the intent with which the marriage was entered into, *i.e.* primarily to acquire a status or a privilege, is in the past. The English reads “was entered” while the French reads “visait”; the evaluation is therefore conducted at the time of the marriage.

[18] Mr. Ly says the IAD's decision was unreasonable because it failed to “focus on the totality of evidence”. He maintains that the IAD misconstrued and ignored evidence, based its conclusions on unwarranted speculation, and did not give sufficient weight to positive factors demonstrating the marriage was genuine and not entered into primarily for immigration purposes.

[19] For example, Mr. Ly says it was not necessarily inconsistent for Ms. Do to begin collecting documents in support of a permanent residence application before the wedding, even though the couple claimed not to have discussed where they would live until after they were married:

It is very understandable that [Ms. Do] obtained some documents while she could, because an opportunity arose, in this case, the ex-husband contacted her, because she might move to the country in the future to be with him, although the decision was not made at the time. The Member errs in drawing negative inferences from conduct and finding inconsistencies where none actually exist. Even if the Applicant had thoughts of moving to Canada and did some preliminary preparation merely in case it was later decided she would move to Canada, this should not be sufficient to find the Applicant's primary purpose is to immigrate to Canada.

[20] Mr. Ly also argues that the IAD misconstrued the circumstances surrounding her request for a letter of consent from her former husband to enable their children to travel to Canada. He says that a different document was required for immigration purposes, and this document was not obtained until two months after the wedding.

[21] I agree with the Respondent that Mr. Ly is essentially inviting the Court to re-weigh the evidence and substitute its view for that of the IAD. That is not the purpose of judicial review (*Ta v Canada (Citizenship and Immigration)*, 2021 FC 323 at para 12, citing *Rahman v Canada (Citizenship and Immigration)*, 2013 FC 877 at para 17). The IAD reasonably found that the numerous evidentiary inconsistencies and lack of clear, cogent and convincing explanations undermined Mr. Ly and Ms. Do's credibility.

[22] The IAD did not base its adverse credibility findings on unwarranted speculation, or unfounded assumptions about what a genuine marriage ought to look like. In the words of the IAD:

Human relations are difficult to judge, at the best of times. It is not for me to demand that a certain amount of time must pass before marriage, or that discussions about the future must happen earlier rather than later. However, where there are internal inconsistencies, inconsistencies between witnesses and with documents, and explanations that do not shed light on decisions made in a relationship, serious credibility concerns arise.

[23] Mr. Ly argues the IAD improperly based its adverse credibility findings on the absence of corroborative evidence of his communications with Ms. Do prior to their marriage (citing *Chen v Canada (Citizenship and Immigration)*, 2019 FC 162 at para 28). He relies on Justice Sébastien Grammond's decision in *Senadheerage v Canada (Citizenship and Immigration)*, 2020 FC 968, for the proposition that a decision-maker can only require corroborative evidence if (a) the decision maker clearly sets out an independent reason for requiring corroboration, including credibility concerns, or (b) the applicant fails to provide a reasonable explanation for not obtaining evidence that would be reasonably expected to be available (at para 36).

[24] Here, the IAD provided a clear explanation for its concerns respecting the lack of corroborating documentation for pre-marriage communications:

I also find that the Appellant and Applicant entered into this relationship very quickly with limited corroborative evidence of how these two acquaintances moved from introduction to marriage proposal within just two months. What is conspicuously absent here is any evidence of the communications between the couple for those months leading to the marriage trip. The two testified of their

communication via Facebook messenger but this evidence was not produced for the visa post, nor has it been disclosed for the hearing. They explain that there has been a change of phones on the part of the Applicant and a lost Facebook password. It is not clear why the Appellant still has not provided the chat records from his account. Further, as FB Messenger is an online application, it need not be limited to one's original phone to retrieve chat records.

[25] Mr. Ly also asserts that evidence of the ongoing nature of the relationship should have been used to judge whether it was genuine at the time of the marriage. There was evidence post-dating the marriage demonstrating Mr. Ly's financial support of Ms. Do, ongoing communications, trips to Vietnam by Mr. Ly, intermingling of family and friends and, most importantly, a common child of the relationship.

[26] Mr. Ly relies on *Gill v Canada (Citizenship and Immigration)*, 2010 FC 122, where Justice Robert Barnes observed that, in the assessment of the legitimacy of a marriage, great weight must be attributed to the birth of a child, and this may give rise to an evidentiary presumption in favour of the genuineness of the marriage (at para 8):

[...] Where there is no question about paternity, it would not be unreasonable to apply an evidentiary presumption in favour of the genuineness of such a marriage. There are many reasons for affording great significance to such an event not the least of which is that the parties to a fraudulent marriage are unlikely to risk the lifetime responsibilities associated with raising a child. [...]

[27] However, the presence of a child is not determinative. As Justice Nicholas McHaffie held in *Kusi v Canada (Citizenship and Immigration)*, 2021 FC 68, it is open to the IAD to find that credibility concerns outweigh the presence of a child: "the weighing of evidence and factors in

support of a genuineness determination is the role of the IAD. This Court must refrain from reweighing the evidence, and can intervene only when the assessment of evidence is unreasonable” (at para 29, citing *Vavilov* at para 125).

[28] I am satisfied the IAD gave appropriate weight to the presence of a child of the relationship, recognizing this as the most significant positive factor. Indeed, it appears the IAD applied the presumption of genuineness, but found this was insufficient to establish the marriage was not entered into primarily for immigration purposes:

Most significantly, the Appellant and Applicant now have a child, born in October 2020. In considering this evidence, particularly the birth of a child, I am unable to find that these generally positive indicia of a genuine relationship outweigh the concerns regarding the primary intent at the time that this relationship was initiated. While this positive evidence may suggest that this relationship has “become” genuine over time, in order to meet both prongs of the test, it must have been genuine from the start. As such, I do not find that the Appellant has discharged his onus in establishing that both prongs of the bad faith relationship do not apply to his marriage, as required under section 4(1) of the *Immigration and Refugee Protection Regulations*.

[29] The IAD’s decision was justified, intelligible and transparent, and falls within the range of acceptable outcomes defensible in respect of the facts and law.

V. Conclusion

[30] The application for judicial review is dismissed. Neither party proposed that a question be certified for appeal.

JUDGMENT

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

“Simon Fothergill”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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