Federal Court Cour fédérale

Date: ~~2020~~ 20221125

Docket: IMM-3274-20

Citation: 2022 FC 1624

Ottawa, Ontario, November 25, 2022

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

NDIAYE GUEYE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ndiaye Gueye, lost his permanent residence status in Canada because he was not in the country for the previous five years (permanent residents are required to be present for 730 days during the preceding five years). Before his status was revoked, the Applicant applied for a travel document to return to Canada to join his wife and children (she had four children from a previous marriage, and they have one child together), who had come here claiming refugee status.

[2] The visa officer denied the Applicant's request for a travel document as a permanent resident. The Immigration Appeal Division (IAD) dismissed his appeal. The Applicant now seeks judicial review of the IAD decision, claiming it erred in assessing the hardship that his wife and child would experience if he was not permitted to join them, and also in its assessment of the best interests of the children involved.

[3] For the reasons set out below, the application for judicial review will be dismissed. I am not persuaded the IAD made the legal errors the Applicant alleges, and the remainder of his arguments involve asking the Court to re-weigh the evidence, which is not its role on judicial review.

I. Background

[4] The Applicant was born in Senegal and lived there until he arrived in Canada on October 26, 2010, as a permanent resident in the Qualified Workers category. He left Canada soon after his arrival because his mother suffered a stroke on November 15, 2010. His siblings in both Senegal and the United States were unable to care for their mother.

[5] The Applicant's mother's health improved in 2012, and he returned to Canada. His mother had another stroke in February 2012, and the Applicant again returned to Senegal to care for her. He has not returned to Canada since, although he did travel to France (to visit family) and to Rwanda and the Ivory Coast (for work purposes). While the Applicant was away on these trips, his sister lived with the mother, whose health had improved after 2014.

[6] On March 18, 2018, the Applicant married his current wife (his previous marriage had ended in divorce). She has four children from a previous marriage, aged two, six, ten and twelve years old at the time of the IAD hearing. The Applicant's wife testified that she fled Senegal in July 2018, because her ex-husband threated to subject their eldest daughter to Female Genital Mutilation (FGM). At the time she fled, the Applicant's wife was pregnant with their child.

[7] The Applicant's wife arrived in Canada in September 2018, and claimed refugee status. The Applicant applied for a travel permit on December 19, 2018 because he wanted to be with his wife when she gave birth. The couple's child was born on January 12, 2019. On April 3, 2019, a visa officer advised the Applicant that his permanent residence had been revoked because he was in violation of his residency obligations. No travel document was issued to him.

[8] The Applicant appealed the visa officer's decision to the IAD. His request to attend the hearing in person was denied. The Applicant submitted documentation in support of his appeal, and the Minister made written submissions opposing it. On February 27, 2020, the IAD held a hearing of the appeal; the Applicant participated by teleconference and was represented by counsel who was present at the hearing. The IAD issued its decision on the day of the hearing, denying the appeal.

[9] The IAD noted that the Applicant had not challenged the revocation of his permanent residence, which was based on the fact that he had not been present in Canada for any of the previous five years. In light of this, the IAD found that the Applicant's humanitarian and

compassionate (H&C) claim would have to be based on very significant considerations to overcome his complete failure to meet the residency obligations.

[10] The IAD found the Applicant's degree of establishment in Canada to be minimal given his short presence in the country and lack of any efforts to obtain housing, employment, or otherwise to integrate into Canadian society. Next, the IAD considered the potential consequences of the Applicant's loss of status on his wife and the children in Canada. It concluded that the Applicant had failed to establish, on a balance of probabilities, that they would suffer significant difficulties if his status was revoked. Finally, the IAD examined the best interests of the children affected, and it concluded that this factor did not justify an exemption. Therefore, the IAD dismissed the Applicant's appeal.

[11] The Applicant seeks judicial review of the IAD decision.

II. Issues and Standard of Review

[12] The only issue in this case is whether the IAD decision is reasonable. The Applicant's challenge focuses entirely on the IAD's assessment of the hardship to his wife and child, as well as on its assessment of the best interests of the children involved.

[13] The IAD decision is to be reviewed under the framework for analysis set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Under the *Vavilov* framework, a reviewing court "is to review the reasons given by the administrative decision

maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at para 2).

[14] The burden is on the Applicant to satisfy the Court "that any shortcomings or flaws relied on… are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100, cited with approval in *Canada Post* at para 33). The *Vavilov* framework is intended to reinforce a "culture of justification" in public administration (see paras 2 and 14). In part, it seeks to accomplish this by requiring decision makers to be responsive to the main arguments brought forward by the parties (see para 125).

[15] Under *Vavilov*, factual determinations made by the decision-maker will not be lightly disturbed:

> It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker" (citations omitted, para 125).

[16] The type of factual error that may warrant relief is specified in paragraph 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7, which provides that this court may grant relief if it is satisfied that the decision-maker:

18.1(4)(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	18.1(4)(d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

III. Analysis

[17] The Applicant does not dispute the IAD's findings regarding his lack of presence in Canada, or its impact on the nature of the case he needed to make to obtain H&C relief. To put it plainly, the Applicant accepts that he had a steep hill to climb because of his complete lack of presence in Canada during the preceding five years.

[18] Instead, the Applicant challenges the IAD's assessment of the hardship he and his wife and child would experience if he was not allowed to come to Canada, arguing that the IAD wrongly questioned the nature of his marriage and ignored key evidence about the challenges his wife faced as a newcomer to Canada. He also submits that the IAD erred in its assessment of the best interests of the children involved. Each claim will be considered in turn.

A. *Hardship and the nature of the marital relationship*

[19] The Applicant asserts that the IAD's decision is unreasonable because it unjustifiably undermined his relationship with his wife, wrongly called into question his evidence because of the lack of corroboration, and it ignored key evidence he had submitted. The Applicant submits that the IAD's decision is not intelligible, and therefore unreasonable.

[20] I am not persuaded.

[21] Regarding the nature of the relationship, the Applicant's arguments focused on the following key points:

[22] *Timing of the Applicant's wife's departure from Senegal*: she testified that she fled Senegal shortly after her marriage to the Applicant in order to prevent her ex-husband from subjecting their eldest daughter to FGM. She was able to flee so quickly because she had a valid visa to the United States, whereas the Applicant had to delay his departure because he did not have such a visa. The Applicant argues that the IAD wrongly questioned the timing of his wife's departure. I disagree. The IAD's decision mentions the timing of the wife's departure, but it focused on the Applicant's delay in seeking to obtain a travel document. She arrived in Canada in September 2018, but he did not try to obtain a travel document until December 2018. The IAD reasonably considered that this delay weighed against the Applicant's claim, because it is one factor that calls into question his intention to come to Canada on a permanent basis to be with his wife and the children.

[23] *The wife's status in Canada*: the IAD noted that the Applicant's wife's refugee claim had not been determined at the time of the hearing. The Applicant claims this is an irrelevant consideration. I disagree, because the wife's uncertain status in Canada at the time of the hearing was pertinent to the overall assessment of the case. In any event, this was not a major factor in the IAD's decision or reasoning process.

[24] *Financial support to the Applicant's wife and children*: the IAD noted the Applicant's testimony that he was providing financial support to his wife and the children, but it also found that there was only evidence of two payments. The Applicant claims that on this point, as on several others, the IAD erred in calling his evidence into question because of a lack of corroborating evidence. I am not persuaded. The IAD's decision is grounded in the evidence, and it had reason to question the nature and degree of support the Applicant had provided to his wife and the children, given the lack of documentary evidence and the absence of a compelling explanation by the Applicant of his efforts to obtain these records. The IAD's treatment of the corroborating evidence point is discussed in more detail below.

[25] *Delay in adding Applicant's name to birth certificate*: the IAD noted that the Applicant's wife did not apply to add his name to their child's birth certificate until several months after she first obtained it. The Applicant submits that the IAD ignored her explanation (that both parents were required to be physically present for both names to appear on the birth certificate), and it erred in doubting her testimony because of the lack of corroborative evidence. He argues that the IAD could easily have confirmed this by an internet search after the hearing, and points to an exhibit to the affidavit he filed on the judicial review that confirms his wife's evidence.

[26] The Respondent objected to the additional evidence filed by the Applicant, and I agree that it is not admissible. The case law has consistently held that subject to exceptions that do not apply here, judicial review is limited to the record that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22; *Sharma v Canada (Attorney General)*, 2018 FCA 48). The

Applicant's argument that this evidence should be admitted because he was denied procedural fairness must fail. The IAD questioned both the Applicant and his wife on this specific point, and raised it again during the final submissions made by his counsel. He received notice about the IAD's concerns, and his counsel did not ask for an opportunity to file further evidence after the hearing. He was not denied procedural fairness, and the additional evidence is not admissible on judicial review.

[27] I am not persuaded that the IAD's reference to the delay in adding the Applicant's name to the birth certificate is unreasonable. It is one piece of the factual matrix that the IAD was required to consider, and the fact that his wife only sought to add his name to the document after his request for a travel document was denied is a relevant consideration.

[28] *The return airplane ticket and hotel reservation*: the IAD refers to the evidence that the Applicant purchased a return airline ticket when he made travel arrangements to come to Canada at the time of his application, and he also made a hotel reservation rather than staying with his wife. He submits that the IAD erred by ignoring the explanation for these things, namely that he could not purchase a one-way ticket because he did not have status in Canada, and it was impractical for him to stay with this wife because she and the children shared a small apartment with her brother and his family. I am not persuaded that the IAD's reference to these facts was unreasonable.

[29] The IAD notes the lack of any evidence to corroborate the ticket purchase explanation. Given the backdrop of the Applicant's lack of ties to Canada, his failure to spend any time here

during the preceding five years, and his business and personal ties to Senegal, the IAD had reason to question whether he really intended to remain in Canada, and the return airplane ticket is a relevant consideration on that issue. The hotel reservation is mentioned, and the IAD states that it gives it little weight in the overall assessment of the case. Even if I accepted that the IAD's failure to discuss the explanation for why he made the hotel reservation was unreasonable, the Applicant's argument on this point would not be sufficient to overturn the decision.

[30] One of the Applicant's main arguments on judicial review is the IAD's alleged errors in mentioning the lack of corroborating evidence. He claims that the IAD had no basis to question the credibility of his evidence, and it erred in drawing negative inferences from the lack of corroboration. I disagree.

[31] This Court has long-accepted that there is a presumption that sworn testimony is to be treated as reliable unless there is a reason to doubt its truthfulness, usually referred to as the *Maldonado* principle after the touchstone case on this point: *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 at 305, [1979] FCJ No 248 (CA) [*Maldonado*]. A corollary of this principle is that requiring corroboration in the absence of a pre-existing "reason to doubt" the sworn evidence effectively reverses the presumption of truthfulness: *Senadheerage v Canada (Citizenship and Immigration)*, 2020 FC 968 at para 27 [*Senadheerage*].

[32] However, the *Maldonado* presumption is rebuttable, and in assessing whether there is a reason to doubt the truthfulness of sworn testimony, a decision-maker is required to assess the overall credibility of the evidence based on a practical and common-sense view of the matter,

subject always to the caution that experience in Canada may not directly translate into what is "normal" or "expected" in other countries (see *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776; *Al Dya v Canada (Citizenship and Immigration)*, 2020 FC 901).A leading case on credibility assessments in Canadian law, *Faryna v Chorny*, [1952] 2 D.L.R. 354 (BCCA), underlines the practical nature of the assessment and the importance of the totality of the circumstances (at p. 357):

> In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[33] In this case, the IAD did not err in questioning the Applicant's credibility based on the overall nature of his narrative, taking into account his failure to meet even a single day of his residency obligation, the short time that passed between his marriage and his wife's departure from Senegal, his lack of urgency in seeking to join her and the children here, and his travel arrangements which did not indicate he planned a long-term stay in Canada to be reunited with his wife and the children. Given these facts, the IAD had reason to question why the Applicant failed to provide more evidence about his ongoing financial support, the delay in adding his name to the birth certificate, and about why he purchased a return ticket instead of a one-way ticket when he sought to come to Canada.

[34] Considering the totality of the arguments, and reading the IAD decision in light of the circumstances of the case and the evidence in the record (and the evidence that was not in the record), I am not persuaded that the IAD's assessment of the hardship factor is unreasonable.

[35] The IAD clearly understood the relevant facts, and it expressed its sympathy with the difficulties faced by the Applicant's wife and children. I agree with the Respondent's assertion that the IAD's decision largely reflected the reality that the denial of the Applicant's appeal would leave matters as they had been: based on the short time they had lived together, the evidence of the Applicant's delay in seeking to join his wife and the children in Canada, the questions around the nature and degree of financial support he provided, and the situation as a whole. This analysis reflects the IAD's application of the relevant law to the facts in the record, and its reasoning on these points is clearly expressed and justifies the outcome it reached. That is what reasonableness requires.

B. *The Best Interests of the Children*

[36] The Applicant claims the IAD's analysis of the best interests of the children is woefully lacking. He says that the IAD failed to consider the essential point of his claim – that the loss of his status would have a negative impact on the children because he would be denied the opportunity to assist them and his wife.

[37] I am not persuaded.

[38] The Applicant asserts that the IAD's analysis of the BIOC factors was tainted by its efforts to undermine his relationship with his wife. These submissions have been dealt with earlier, and this analysis does not need to be repeated. In sum, I find the IAD reasonably took

into account the facts of the relationship and subsequent developments, and this was reasonable because it reflects the record and is a pertinent consideration to the Applicant's claim.

[39] The Applicant submits that the IAD failed to give due consideration to the significant difficulties his wife had encountered on arrival in Canada, including problems finding housing, her limited opportunity to work because of her childcare responsibilities, and the added strain of looking after an infant in addition to her duties towards her four other children. In light of this evidence, he claims it is impossible to understand how the IAD could conclude that the children's best interests did not support his request to return to Canada.

[40] I disagree. On this point, I agree with the Respondent that the IAD's reasoning is based on its assessment of the status quo, and while the IAD accepted and acknowledged the difficulties faced by the Applicant's wife and children in Canada, it found that the best interests of the children did not outweigh the Applicant's failure to meet his residency requirements. On this point, it is worth remembering that the Applicant accepts that he had a steep hill to climb to overcome his complete failure to abide by his residency obligation over five years.

[41] The IAD accepted the wife's evidence about the various challenges she faced in finding accommodation, and in seeking paid employment because of her childcare responsibilities. The Panel acknowledged the fact that the wife bore the added burden of looking after a newborn baby, in addition to her four other children. There can be no doubt that the IAD was aware of all of these facts, and its decision shows that it considered them in the course of its analysis.

[42] There is also no doubt that the IAD weighed other evidence too, including: the short time that the Applicant and his wife had lived together in Senegal; his delay in trying to join her and the children after they came to Canada; and the absence of evidence of financial or other support provided by the Applicant. These are relevant considerations in assessing the BIOC factors, and it is not the Court's role to re-weigh the evidence. The IAD clearly sympathized with the wife's situation, but concluded that the BIOC factors did not outweigh other considerations such that they justified an exception. This is a reasonable analysis based on the evidence, even if another decision-maker might have reached another conclusion.

[43] I find no basis to overturn the decision arising from the Applicant's arguments about the IAD's analysis of the best interests of the children.

IV. Conclusion

[44] For the reasons set out above, the application for judicial review is dismissed.

[45] The Applicant's arguments must be rejected because they ask the Court to re-weigh the evidence, which is not permitted under *Vavilov*. Overall, the IAD's reasoning reflects the legal principles that govern the Applicant's request, as applied to the key facts in evidence. The reasoning process that led the IAD to reject the appeal is sufficiently clear and understandable. That is all that reasonableness requires.

[46] There is no question of general importance for certification.

JUDGMENT in IMM-3274-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3274-20
STYLE OF CAUSE:	NDIAYE GUEYE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 16, 2022
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	NOVEMBER 25, ~~2018~~ 2022

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