Federal Court  Cour fédérale

Date: 20121105

Docket: IMM-1498-12

Citation: 2012 FC 1293

Toronto, Ontario, November 5, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SAMUEL KITOMI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] [1] ". . . 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" (*Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BCCA)).

(As specified in *Froment v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1002, 299 FTR 70.)

II. Introduction

[2] The Applicant is a Canadian citizen. The Applicant's wife and stepson are citizens of the Republic of the Congo, applied for permanent residence in Canada as members of the family class on the basis of their relationship to the Applicant under subsection 12(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Applicant seeks judicial review of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board by which it was determined that the marriage was not genuine and had been entered into primarily for the purpose of acquiring a status or privilege under the *IRPA*.

III. Judicial Procedure

[3] This is an application under subsection 72(1) of the *IRPA* for judicial review of the IAD's decision, dated November 28, 2011.

IV. Background

[4] The Applicant, Mr. Samuel Kitomi, is a Canadian citizen who was born in 1960 in the Congo. He was married to a woman in 1993, who he divorced in 1995.

[5] The Applicant's spouse, Ms. Diane Sorelle Azam Mpono, was born in 1980 in the Congo; her son, Christophe, was born in 2000 in the Congo.

[6] The Applicant and Ms. Mpono met in November 2004 in Gabon, where both were refugees. They began cohabiting in February 2005.

[7] The Applicant is Baha'i; Ms. Mpono, Roman Catholic; the Applicant, in his testimony, brought forward the universal outlook that the Baha'i faith is favourable to all faiths in its recognition of the unity encompassing them all.

[8] On June 8, 2005, the Applicant came to Canada as a Convention refugee and became a permanent resident of Canada.

[9] On June 25, 2005, the Applicant and Ms. Mpono were married by power of attorney since the Applicant was living in Canada and Ms. Mpono in Gabon.

[10] On September 10, 2010, an immigration officer refused Ms. Mpono's application to be selected for permanent residence as a member of the family class on the basis of her relationship to the Applicant. The Applicant appealed the decision to the IAD under subsection 63(1) of the *IRPA*.

[11] In October 2011, the Applicant visited his wife in Gabon.

[12] In support of the Appeal, the Applicant filed the following documentary evidence: emails and correspondence between himself and Ms. Mpono, emails to his Member of Parliament, evidence of transfers of funds from 2005 to 2011, photographic evidence of the Applicant's visit to Gabon, and telephone cards. At the Appeal, he testified that he sent Ms. Mpono $300 CAD per month for a total of $25,000 CAD.

[13] The IAD dismissed the Applicant's appeal on November 28, 2011.

V. Decision under Review

[14] The IAD determined that, on a balance of probabilities, the Applicant's marriage was not genuine and had been entered into primarily for the purpose of acquiring a status or privilege under the *IRPA* [bad faith marriage]. Pursuant to section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*], Ms. Mpono could not be considered the Applicant's spouse for the purpose of the family class provisions of the *Regulations* and the *IRPA*.

[15] The IAD noted that section 4 was amended on September 30, 2010 but found that the amendment did not affect the outcome of the Appeal.

[16] The IAD stated that there were two elements to the bad faith marriage test: (i) a marriage that is not genuine; and, (ii) a marriage that was entered into primarily for the purpose of acquiring a status or privilege under the *IRPA*. The Applicant has the onus of showing, on a balance of probabilities, that his marriage is not a bad faith marriage.

[17] According to the IAD, significant gaps, discrepancies, and inconsistencies in the evidence demonstrated that, on a balance of probabilities, the Applicant's marriage was not genuine. The Applicant and Ms. Mpono did not intend to have a lasting relationship since they had not seen each other for 6 years and had "not bothered to learn, share or remember basic information about each other" (Decision at para 12).

[18] The IAD considered the Applicant and Ms. Mpono to be incompatible in age and marital background as he is 20 years older and had been previously married and divorced. They were also incompatible due to their different religious beliefs and the fact that Ms. Mpono has a child. While the incompatibilities were not determinative, they gained significance in light of the rapid development of the relationship and the inconsistencies and discrepancies in their knowledge of one another.

[19] The length of the Applicant and Ms. Mpono's relationship was not accurately set out in the documentation; they met in November 2004 and began cohabiting in February 2005. They did not satisfactorily explain why, given their incompatibilities, the relationship so rapidly evolved into marriage or why they married after he left Gabon.

[20] The IAD noted that the Applicant and Ms. Mpono provided documented evidence that they regularly communicated. The IAD accepted that costs and the Applicant's need to preserve his refugee status prevented the Applicant from visiting Ms. Mpono and Christophe in the Congo but added that they could have met in another country. The IAD noted that his October 2011 visit occurred after he acquired Canadian citizenship and after the immigration officer refused Ms. Mpono's application for permanent residence.

[21] Nonetheless, the Applicant and Ms. Mpono did not demonstrate that they knew one another well enough to establish a genuine marriage. The IAD found that there were significant inconsistencies and discrepancies in their knowledge of each other, noting Ms. Mpono's unawareness of the duration of the Applicant's studies in Europe, the details of his refugee claim

and his first marriage, his relationship with another woman after his divorce, and his religious affiliation. The Applicant was unaware of Christophe's weekly religious classes and contradicted Ms. Mpono's testimony on the religious education of any children they might have. There was no evidence to demonstrate any depth or commonality in the relationship.

[22] The IAD inferred that the marriage was entered into primarily for the purpose of acquiring a status or privilege under the IRPA from the Applicant's inability to establish that it was a genuine marriage. It was more likely than not that the marriage was entered into primarily to allow Ms. Mpono and Christophe to acquire permanent resident status in Canada.

VI. Issue

[23] Did the IAD base its decision on an erroneous finding of fact rendered in a perverse or capricious manner or without regard to the evidence before it?

VII. Relevant Legislative Provisions

[24] The following legislative provisions of the *IRPA* are relevant:

12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	**12.** (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.
…	[...]
63. (1) A person who has	**63.** (1) Quiconque a déposé,

filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.	conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

[25] The provisions of the *Regulations* are relevant:

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	**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*) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or	*a*) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;
(*b*) is not genuine.	*b*) n'est pas authentique.
…	[...]
116. For the purposes of subsection 12(1) of the Act, the family class is hereby prescribed as a class of persons who may become permanent residents on the basis of the requirements of this Division.	**116.** Pour l'application du paragraphe 12(1) de la Loi, la catégorie du regroupement familial est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents sur le fondement des exigences prévues à la présente section.
117. (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	**117.** (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :

(*a*) the sponsor's spouse, common-law partner or conjugal partner;

a) son époux, conjoint de fait ou partenaire conjugal;

(*b*) a dependent child of the sponsor;

b) ses enfants à charge;

(*c*) the sponsor's mother or father;

c) ses parents;

(*d*) the mother or father of the sponsor's mother or father;

d) les parents de l'un ou l'autre de ses parents;

(*e*) [Repealed, SOR/2005-61, s. 3]

e) [Abrogé, DORS/2005-61, art. 3]

(*f*) a person whose parents are deceased, who is under 18 years of age, who is not a spouse or common-law partner and who is

f) s'ils sont âgés de moins de dix-huit ans, si leurs parents sont décédés et s'ils n'ont pas d'époux ni de conjoint de fait :

(i) a child of the sponsor's mother or father,

(i) les enfants de l'un ou l'autre des parents du répondant,

(ii) a child of a child of the sponsor's mother or father, or

(ii) les enfants des enfants de l'un ou l'autre de ses parents,

(iii) a child of the sponsor's child;

(iii) les enfants de ses enfants;

(*g*) a person under 18 years of age whom the sponsor intends to adopt in Canada if

g) la personne âgée de moins de dix-huit ans que le répondant veut adopter au Canada, si les conditions suivantes sont réunies :

(i) the adoption is not being entered into primarily for the purpose of acquiring any status or privilege under the Act,

(i) l'adoption ne vise pas principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi,

(ii) where the adoption is an international adoption and the country in which the person resides and their province of intended destination are parties to the Hague Convention on Adoption, the competent authority of the country and of the province have approved the adoption in writing as conforming to that Convention, and

(ii) s'il s'agit d'une adoption internationale et que le pays où la personne réside et la province de destination sont parties à la Convention sur l'adoption, les autorités compétentes de ce pays et celles de cette province ont déclaré, par écrit, qu'elles estimaient que l'adoption était conforme à cette convention,

(iii) where the adoption is an international adoption and either the country in which the person resides or the person's province of intended destination is not a party to the Hague Convention on Adoption

(iii) s'il s'agit d'une adoption internationale et que le pays où la personne réside ou la province de destination n'est pas partie à la Convention sur l'adoption :

(A) the person has been placed for adoption in the country in which they reside or is otherwise legally available in that country for adoption and there is no evidence that the intended adoption is for the purpose of child trafficking or undue gain within the meaning of the Hague Convention on Adoption, and

(A) la personne a été placée en vue de son adoption dans ce pays ou peut par ailleurs y être légitimement adoptée et rien n'indique que l'adoption projetée a pour objet la traite de l'enfant ou la réalisation d'un gain indu au sens de cette convention,

(B) the competent authority of the person's province of intended destination has stated in writing that it does not object to the adoption; or

(B) les autorités compétentes de la province de destination ont déclaré, par écrit, qu'elles ne s'opposaient pas à l'adoption;

(*h*) a relative of the sponsor, regardless of age, if the sponsor does not have a spouse, a common-law partner, a conjugal partner, a child, a mother or father, a relative who is a child of that mother or father, a relative who is a child of a child of that mother or father, a mother or father of that mother or father or a relative who is a child of the mother or father of that mother or father	*h*) tout autre membre de sa parenté, sans égard à son âge, à défaut d'époux, de conjoint de fait, de partenaire conjugal, d'enfant, de parents, de membre de sa famille qui est l'enfant de l'un ou l'autre de ses parents, de membre de sa famille qui est l'enfant d'un enfant de l'un ou l'autre de ses parents, de parents de l'un ou l'autre de ses parents ou de membre de sa famille qui est l'enfant de l'un ou l'autre des parents de l'un ou l'autre de ses parents, qui est :
(i) who is a Canadian citizen, Indian or permanent resident, or	(i) soit un citoyen canadien, un Indien ou un résident permanent,
(ii) whose application to enter and remain in Canada as a permanent resident the sponsor may otherwise sponsor.	(ii) soit une personne susceptible de voir sa demande d'entrée et de séjour au Canada à titre de résident permanent par ailleurs parrainée par le répondant.

VIII. Position of the Parties

[26] The Applicant submits that the IAD ignored evidence demonstrating, on a balance of probabilities, that his was not a bad faith marriage. The Applicant cites *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, for the principle that the IAD's "burden of explanation increases with the relevance of the evidence in question to the disputed facts" (at para 17) and *Provost v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1310, 360 FTR 287, which held that the IAD must analyze evidence that contradicts a bad faith marriage finding.

[27] According to the Applicant, the IAD did not refer to any corroborating evidence that was presented. In particular, the IAD did not explain why it disregarded evidence of continuous communication and financial support over a lengthy period. The IAD could have rejected the evidence but needed to explain its reason for doing so as the evidence was probative of a central issue and contradicted the IAD's findings.

[28] The Applicant also argues that the IAD made three unreasonable findings of fact. First, the Applicant claims that the IAD was unreasonable in finding that he and Ms. Mpono did not satisfactorily explain (i) the rapid development and short duration of their relationship given their incompatibilities, or (ii) their failure to marry before he left Gabon. The Applicant submits that he and Ms. Mpono gave a clear and consistent account of the nature and evolution of their relationship. Both explained that they could not marry before he left Gabon for financial reasons and that Ms. Mpono's family was not living in Gabon. Each explained the importance of having family attend weddings in Africa, even if the Applicant himself could not, and that proxy weddings were an accepted practice in Congolese law and by the Catholic Church.

[29] Second, the Applicant argues that the IAD was unreasonable to infer that his marriage was not genuine from his failure to visit Ms. Mpono until October 2011. The Applicant states that he provided a cogent explanation for his inability to travel; he could not visit his wife in the Congo because returning could be considered reavailment and could have jeopardized his refugee status. Moreover, the Applicant adduced evidence that he visited his wife immediately after obtaining citizenship and travel funds.

[30] Finally, the Applicant contends that the IAD was unreasonable to find that he and Ms. Mpono did not know each other to the extent expected of a genuine marriage. Inconsistencies and discrepancies in their knowledge of one another, alleged by the IAD arose from the IAD as they had not assessed the evidence as a whole in cultural context in respect of testimony over the telephone.

[31] The Applicant argues that there was no inconsistency or discrepancy in knowledge with respect to the duration of the Applicant's studies in Europe since Ms. Mpono had testified that the Applicant studied pharmacy in Europe for many years. The IAD also erred in finding that she was not aware of the details of his first marriage and divorce because she had testified that his first wife left him for another man, that the divorce took place in 1995, and that they did not have children. The Applicant concedes that Ms. Mpono did not know the Applicant had converted to Baha'i but responds that she was aware that he had been born Christian and was not Catholic.

[32] The Respondent contends that the IAD considered the totality of the evidence, including evidence of communication, their October 2011 trip, and funds transfers but found that its probity was outweighed by inconsistencies and discrepancies in their knowledge of one another that undermined their credibility and the genuineness of their relationship. Citing *Lai v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125, the Respondent argues that the IAD is presumed to have weighed and considered all the evidence. The Respondent submits that simply not mentioning all the evidence does not rebut the presumption, citing *Froment v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1002, 299 FTR 70.

[33] The Respondent challenges the probative value of the Applicant's evidence. The photographs confirm that he visited Ms. Mpono in October 2011, a fact that the IAD never disputed. For the IAD, the central issue was that the trip did not occur until 6 years after marriage; the photographs, even if ignored, were not material to this issue. Evidence of communication and funds transfers, moreover, did not address the IAD's concerns as to their knowledge of one another's histories.

[34] In the Respondent's view, the Applicant's argument that the IAD ignored evidence amounts to a disagreement with the way the IAD weighed the evidence. The Respondent contends that the IAD supported its finding by discussing the evidence it considered most cogent. Evidence that was not analyzed by the IAD did not undermine the findings it considered determinative; that the Applicant's marriage was not a genuine marriage because the relationship evolved too quickly in light of incompatibilities, that they had not seen each other until 6 years after the marriage, and that they did not demonstrate that they knew one another well enough.

[35] The Respondent responds that the IAD was reasonable to infer that the Applicant's 6 year absence was inconsistent with a genuine marriage. The Applicant, as the IAD noted, could have visited Ms. Mpono in another country and could have sought the financial assistance of relatives, as he did when he visited in October 2011.

[36] According to the Respondent, it was also reasonable to infer that the Applicant and Ms. Mpono did not know each other well enough to have a genuine marriage. First, Ms. Mpono

could only testify that the Applicant spent many years studying in Europe but could not say how long he stayed there. Second, she was unaware of the details of his first marriage, including its length. Finally, Ms. Mpono did not know that the Applicant had converted and could not describe the details of his refugee claim.

IX. Analysis

[37] Whether the IAD based its decision that the Applicant's marriage was not a genuine marriage without regard to the material before it is a question of mixed fact and law reviewable on a reasonableness standard (*Wiesehahan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 656). This standard also applies to the question of whether the IAD made any erroneous findings in a perverse or capricious manner (*Singh v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 347).

[38] Because the reasonableness standard applies, the Court may only intervene if the Board's reasons are not justified, transparent or intelligible. To satisfy this standard, the decision must also fall in the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[39] The IAD based its decision on an erroneous finding of fact that it made without regard to the evidence before it. In finding that the Applicant's marriage was a bad faith marriage, the IAD did not analyze two crucial pieces of evidence: testimony by the Applicant that he has sent $300/month to Ms. Mpono and Christophe since moving to Canada and documentary evidence of some of those funds transfers.

[40] This particular ground for review derives from paragraph 18.1(4)(*d*) of the *Federal Courts Act*, RSC, 1985, c F-7 and requires the Applicant to satisfy this Court that (i) the IAD made a palpably erroneous finding of material fact, and (ii) that this finding was made without regard to the evidence (*Cepeda-Gutierrez*, above, at para 14). Since the IAD is particularly well-positioned to make findings of fact, this ground does not invite the Court to re-weigh evidence (*Singh v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1370 at para 14).

[41] There is a rebuttable presumption that the IAD has considered the totality of evidence in assessing whether a marriage is a bad faith marriage (*Provost*, above, at para 31). According to the jurisprudence of this Court, the presumption may be rebutted if the IAD did not, at least, address evidence that is relevant to the question at issue and contradicts its conclusion on that issue. As Justice John Maxwell Evans held in *Cepeda-Gutierrez*, above:

> [17] … the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact 'without regard to the evidence' … In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts".

[42] At the Appeal, the Applicant testified that he (working as a security guard making $12 an hour) has sent Ms. Mpono "about $300" every month for her support because she is unemployed. He also testified that these funds transfers have amounted to a total of "[m]ore or less about $25,000", that Ms. Mpono did not save any of these funds to bring to Canada, and that he pays Christophe's school tuition (Tribunal Record [TR] at pp 23, 24 and 53).

[43] The Tribunal Record includes 23 Customer Receipts [receipts] for funds transfers from Western Union and MoneyGram (at pp 113–136). With exception of one transfer from the Applicant to Romuald Pinda in the amount of $100 CAD, dated January 9, 2007, these receipts refer to funds sent by the Applicant to Ms. Mpono. The amount of each transfer ranges from $80 to $350 CDN, amounting to a total of $4,236 CAD. The Tribunal Record also includes a "Customer Copy", dated February 1, 2006, in respect of $81.96 (at p 114). This document identifies Ms. Mpono as "Sender" and the Applicant as "Receiver" but it is unclear whether this refers to funds sent by Ms. Mpono to the Applicant or to an acknowledgement sent by Ms. Mpono to the Applicant in respect of funds received by Ms. Mpono and sent by the Applicant.

[44] *Khera v Canada (Minister of Citizenship and Immigration)*, 2007 FC 632, outlines a list of factors that the IAD may consider in applying the bad faith marriage test: the length of the relationship before marriage, age differences, former marital or civil status, the respective financial situation and employment of the couple, family background, knowledge of one another's histories, language, and, respective interests. In *Glen v Canada (Minister of Citizenship and Immigration)*, 2011 FC 488, Justice John O'Keefe found that the IAD was unreasonable to disregard voluntary support payments in applying the bad faith marriage test simply because the applicant was also required the make court-ordered support payments to a different sexual partner (at para 47). *Glen* leads to the inference that, in certain circumstances, voluntary support payments are material to a finding that a genuine marriage exists.

[45] Consequently, the jurisprudence of this Court has established that the respective financial situation of the parties and the existence of voluntary support payments are relevant in assessing whether a marriage is or is not a genuine marriage.

[46] Evidence of voluntary support payments totalling $25,000 CAD over 6 years from the Applicant to Ms. Mpono contradicts the IAD's finding that the marriage was not a genuine marriage, especially since the Applicant has produced documentary evidence for $4,236 of the alleged payments. The Applicant also gave up any additional studies in pharmacy for accreditation in Canada as he could not pay for his professional studies and also send funds to his wife. This evidence has probative value on a key issue and this Court, following *Cepeda-Gutierrez*, above, is prepared to infer that the IAD made an erroneous finding of fact without regard to the evidence from the IAD's failure to discuss it. Although *Cepeda-Gutierrez* does not require decision-makers to consider "every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it" (at para 16), reasonableness required the IAD to explain why they disregarded this particular evidence.

[47] Evidence of voluntary payments from the Applicant to Ms. Mpono is a type of evidence falling within the scope of *Cepeda-Gutierrez*. In *Persaud v Canada (Minister of Citizenship and Immigration)*, 2012 FC 274, this Court distinguished evidence that has "specific bearing" on an applicant, which falls within the scope of *Cepeda-Gutierrez*, from general evidence, which does not (at para 15).

[48] The IAD's detailed analysis of the inconsistencies and discrepancies in the Applicant and Ms. Mpono's knowledge of each other support the conclusion that the IAD ought to have analyzed the evidence of voluntary support payments. According to *Cepeda-Gutierrez*, it may be easier to infer that a decision-maker neglected contradictory evidence if it "refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion" (at para 17).

[49] This Court has reached the determination notwithstanding the inconsistencies and discrepancies in the Applicant's and Ms. Mpono's knowledge of each other, the quick evolution of their relationship into marriage, their alleged incompatibilities, and their failure to marry before the Applicant left Gabon.

[50] In *Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331, Justice Evans stated that in applying *Cepeda-Gutierrez*, above, "[m]uch depends on the significance of that evidence when it is considered in light of the other material on which the decision was based" [Emphasis added] (at para 9). Consequently, the question of whether the IAD ought to have had regard to the evidence of the voluntary support payments also involves a consideration of the significance of that evidence against other evidence relied upon by the IAD.

[51] In the present case, evidence relied upon by the IAD in reaching its decision does not diminish the significance of the evidence of the voluntary support payments. In certain circumstances, such evidence may establish a relationship of support that could lead to an inference that a genuine marriage exists. With the exception of evidence that the Applicant and Ms. Mpono lived apart for six years, the evidence discussed by the IAD does not address issues of support,

financial or emotional. Consequently, it cannot be said to diminish the significance of the voluntary support payments.

[52] This Court is not the finder of fact or the decision-maker of first instance to weigh these contradictory pieces of evidence. Pursuant to *Cepeda-Gutierrez* and *Ozdemir*, above, however, the Court did find that the IAD did not give appropriate consideration to the voluntary support payments, an oversight that was unreasonable given the significance of the evidence in light of other evidence that the IAD relied upon.

[53] This conclusion is sufficient to set aside and refer for determination anew the IAD's decision. Consequently, it is not necessary to consider whether the IAD made any erroneous findings in a perverse or capricious manner.

X. Conclusion

[54] For all of the above reasons, the Applicant's application for judicial review is granted and the matter is returned for a hearing anew (*de novo*) before a differently constituted panel of the IAD.

JUDGMENT

THIS COURT ORDERS that Applicant's application for judicial review be granted and the matter be returned for a hearing anew (*de novo*) before a differently constituted panel of the Immigration Appeal Division. No question for certification

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1498-12
STYLE OF CAUSE:	SAMUEL KITOMI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 29, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	November 5, 2012

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