Federal Court Cour fédérale

Date: 20141216

Docket: IMM-4102-13

Citation: 2014 FC 1195

Toronto, Ontario, December 16, 2014

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

THUC PHUONG DANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of the decision of the Immigration Appeal Division [IAD, panel] of the Immigration and Refugee Board, dated May 23, 2013 [Decision], which refused the Applicant's appeal.

[2] The Applicant appealed to the IAD from the decision of a visa officer in Singapore [Officer], in which the Officer refused her husband's application for a permanent resident visa under the family class, because he found their marriage was not genuine and was entered into primarily for the purpose of acquiring status or privilege under IRPA.

[3] This application for judicial review is allowed for the following reasons.

I. Background

[4] The following are the facts that were before the IAD.

[5] Thuc Phuong Dang [the Applicant] is a 41 year old Canadian citizen, born in Vietnam, and is of Chinese descent. Her husband [Mr. Huynh] is a 40 year old citizen of Vietnam, of Chinese descent.

[6] These are not sophisticated parties. Mr. Huynh has the equivalent of a Grade 2 education, and the Applicant, the equivalent of Grade 7 education: Certified Tribunal Record [CTR], pages 21-22. Their English skills are very basic. The mother tongue of both is Chinese.

[7] The couple hired a Vietnamese lawyer to help them with the sponsorship application. The lawyer neither completed the applicant portions of the forms properly, nor did he sign the required "third party representative" portion of the forms. As such, it was not apparent to Citizenship and Immigration [CIC] that the applicants had any representative. One of the major

reasons for refusal by the visa officer, as confirmed by the IAD, was that family information was left out of the immigration forms.

[8] The Applicant was married once previously. She married her first husband in Vietnam in 2002 and sponsored him to come to Canada. He was issued a visa in January 2004, and obtained a divorce in September 2005. This is Mr. Huynh's first marriage.

[9] The Applicant went to visit Mr. Huynh several times since she met him in Vietnam for the first time in 2006. Specifically, she visited in 2007. She went twice in 2008: on her first trip, the couple was engaged and had a celebratory engagement party. The Applicant returned later in 2008 and the couple married on December 28, 2008 in Vietnam. The Applicant returned to Canada in February 2009.

[10] The couple submitted an application for permanent residence under the family class for Mr. Huynh, whose sponsorship application was sent to the Canadian visa post in Singapore in July 2009.

[11] The Applicant returned to Vietnam for the visa office interview on January 25, 2011. She stayed in Vietnam from January 22 to March 10, 2011.

[12] On February 8, 2011, the Officer refused the application, finding that the marriage was not genuine, and was entered into for the purpose of gaining admission to Canada.

[13] The Applicant appealed the Officer's decision to the IAD. The IAD dismissed the appeal, and that Decision is now under review.

II. Decision under Review

[14] The IAD panel conducted a *de novo* hearing, and concluded that the Applicant had failed to establish that the marriage was genuine, and to establish that it was not entered into primarily for the purpose of acquiring a status or privilege under IRPA.

[15] The panel found that the evidence of the Applicant and Mr. Huynh was not credible, that Mr. Huynh had concealed that he had siblings living in the U.S. and Canada, and that the parties had a lack of knowledge of each other that indicated a non-genuine marriage.

[16] Specifically, the Board found certain evidence not to be credible and trustworthy, concluding that the Applicant failed to prove that the marriage "is a genuine one and was not entered into primarily for the purpose of acquiring any status or privilege under the IRPA" (Decision at para 34). These findings are addressed in the Analysis section of these Reasons, below.

III. Issues

The Applicant raised the following three issues about the IAD decision:

1. it demonstrates a reasonable apprehension of bias;
2. it was not reasonable in its conclusions; and
3. it breached the Applicant's right to procedural fairness.

The bulk of the hearing focused on the second issue, which was the strongest of the Applicant's arguments.

IV. Relevant Provisions

[17] Subsection 12(1) of IRPA sets out who may be a member of the family class:

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.

[18] Section 4 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) states that a foreign national will not be considered a spouse if the marriage was not genuine or was entered into primarily for the purpose of acquiring immigration status:

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.

V. Submissions of the Parties

[19] The Applicant submits that the Decision was unreasonable, as the panel misapprehended or ignored key evidence, namely:

- the testimony of three witnesses who were present at the wedding and testified to the genuineness of the marriage;
- 220+ pages of documentary evidence, including evidence of phone calls, wire transfers, visits, and cards exchanged, except one wedding photo, noting that the informal attire and flip flops worn by some of the guests in that photo indicated the wedding was staged; and
- written submissions from Applicant's counsel.

[20] The Applicant also contends that the Board erred by fixating on the Applicant's first marriage, exceeding its jurisdiction by ordering evidence regarding the divorce and making a number of unreasonable inferences not supported by the evidence.

[21] Further, the Applicant submits that the panel denied her procedural fairness by relying on evidence from the Officer that Mr. Huynh was not credible, after the Officer had consulted three outside sources on the expense of obtaining driver's licenses and used the information to cast doubt on Mr. Huynh's credibility without giving him an opportunity to address it.

[22] Finally, the Applicant submits that the Board member demonstrated a reasonable apprehension of bias by making a frivolous allegation that the wedding was staged.

[23] The Respondent, on the other hand, submits that the panel properly considered the evidence. It did not err in seeking the evidence regarding the Applicant's divorce, as it has the power of production and inspection of documents, and may receive and base decisions on any evidence adduced in proceedings that it considers credible and trustworthy (IRPA, ss 174-175).

[24] The Respondent submits that the panel did not ignore evidence, noting key testimony and witnesses in the Decision. The panel chose to concentrate on the evidence of the Applicant and Mr. Huynh, their knowledge of each other's lives, their explanations for failing to be together, and their lack of forthrightness.

[25] Contrary to the Applicant's allegations, the Respondent submits that the panel's inferences were reasonable and that it was open to the panel to weigh and assess evidence.

[26] With respect to the Applicant's allegation that she was denied procedural fairness as a result of evidence wrongly relied on by the Officer, the Respondent submits that the Decision under review was an appeal *de novo* and the information obtained by the Officer regarding the availability of driver's licenses in Vietnam had no bearing on the panel's final decision.

[27] Finally, the Respondent submits that the Applicant has not demonstrated a reasonable apprehension of bias. The threshold for such a finding is very high, and is not met in this case.

VI. Standard of Review

[28] In *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis does not need to be conducted in every instance. Instead, where the standard of review applicable to a particular question before the Court is well-settled by past jurisprudence, the reviewing court may adopt that standard.

[29] Both parties submit, and I agree, that the genuineness of a marriage is a question of fact and reviewable on the reasonableness standard (*Chen v MCI*, 2011 FC 1268 at para 4). Whether or not a marriage is entered into for the purpose of obtaining status under IRPA is also a question of fact, reviewable on a reasonableness standard (*Dunsmuir*, above, at para 51).

[30] Procedural fairness is reviewable on a correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Sidhu v MCI*, 2012 FC 515 at para 38).

VII. Analysis

A. *Issue 1: Has the Applicant established a reasonable apprehension of bias?*

[31] The allegation of bias must be dealt with first. Where bias is found, the decision must be set aside, as the Court cannot speculate whether another decision-maker would have reached the same conclusion on the merits of the claim (*Luzbet v MCI*, 2001 FC 923 [*Luzbet*] at para 4).

[32] No deference is owed to the decision-maker on the issue of bias (*Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour)*, 2003 SCC 29; *Luzbet*, above, at para 5).

[33] Mr. Justice de Grandpré articulated the test for the reasonable apprehension of bias in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at 394-395:

> [T]he apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would a informed person, viewing the matter realistically and practically--and having thought the matter through--conclude. […]
>
> […] The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

[34] The threshold for a finding of perceived bias is high (*R v RDS*, [1997] 3 SCR 484 [*RDS*] at para 112; *Tchiegang v MCI*, [2003] FCJ No 343 at paras 15, 19). Further, alleging bias is a “serious step that should not be undertaken lightly” (*RDS*, above, at para 113; *Es-Sayyid v Canada (MPSEP)*, 2012 FCA 59 at para 50).

[35] While I disagree that the panel had an adequate basis for suggesting that the wedding was staged, there is no merit to the Applicant’s contention that this demonstrated a reasonable apprehension of bias on the part of the panel. The Applicant has provided nothing more than arguments that the Board member (i) could have easily verified the number of guests at the wedding by watching the videos provided, (ii) is culturally insensitive and ignorant of cultural

norms and (iii) did not mention the guests who wore formal attire to the wedding, the stifling temperature in Vietnam.

[36] As such, the Applicant has not met the high threshold required to establish that the Board's findings showed an apprehension of bias in this case. Whether those findings were unreasonable is another matter altogether, and that is both the second, and strongest, argument raised by the Applicant.

B. *Issue 2: Was the panel's decision reasonable?*

[37] The jurisprudence states that a tribunal's decision must demonstrate "justification, transparency and intelligibility within the decision-making process" and fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47).

[38] This case was based on the Board's negative credibility findings based on various factual findings. Several of these findings are problematic -- some of these going back to the Officer's decision. Credibility findings based on problematic factual foundations lead to fundamental weaknesses in justifying the Decision. In my view, the Board's Decision was unreasonable for these reasons.I will deal with the foundational findings of the Board and problems with them, in the order that they were raised by the Board in its Decision.

Employment discrepancies

[39] "The parties gave contradictory information about each other at the interview at the visa office that took place on January 25, 2011" (Decision at para 16). The panel did not accept the explanation that the Applicant and Mr. Huynh did not understand some of the questions posed by the Vietnamese interpreter as they are more comfortable speaking Chinese, their native language, which is the language in which they communicate.

[40] First, it is clear from a reading of the visa office transcript that there were translation issues which led in part to the difficulties, because the interview was done in Vietnamese and not Chinese, the mother tongue of both applicants. Mr. Huynh pointed out to the Officer that he was having translation difficulties, stating that "I didn't understand some questions" and "I am better in Chinese". The Officer provided scant regard to that statement in terms of clarifying the issue. The Board member found that "there does not seem to be any indication that the Applicant or the Appellant are confused by the questions or are having difficulty understanding the interpreter".

[41] I find the couple's testimony before the Officer quite consistent for a newly married couple separated by thousands of miles. The Applicant and Mr. Huynh both stated that he worked in glass moulding. Mr. Huynh said he did other things in his spare time, since the business was not going as well as it had in the past because his brother (a welder) left for Canada. He thus had filled his time studying, and taking driving lessons.

[42] With respect to Ms. Dang's work, she said at the visa office interview that she worked full time making couches. Mr. Huynh answered that she made pool buoyancy devices, on a seasonal basis, because there were no orders during the winter. However, the apparent inconsistencies with respect to Ms. Dang's work are not at issue because the IAD panel determined that there had been obvious confusion in the interpreter's terminology relating to the Applicant's work at the visa office interview.

[43] On the whole, I find that the explanation of the Applicant and Mr. Huynh, in regard to their employment and outside work activities, were consistent (see, for instance, page 476, CTR).

Failure to disclose family members/pull factor

[44] The Board member finds that Mr. Huynh's explanation for failing to disclose in his application his siblings living in the U.S. and Canada was unsatisfactory. He stated that he was told he did not need to list siblings living outside Vietnam, but the panel found it more likely that he wished to conceal their existence as they could be interpreted as a "pull" factor motivating the marriage, and obtaining Canadian citizenship would lead to easier access to his siblings in North America, and vice versa.

[45] There are two issues with this finding of the panel. First, the Applicant did not conceal that he had siblings abroad because he stated in his immigration application that one of the US-based siblings came to his 2008 wedding. He advised that his consultant told him that his other siblings did not need to be added to the form. While this explanation may not be satisfactory for others completing immigration forms, one has to consider the context.

[46] This was an applicant with a Grade 2 education who did not speak English. So he hired a professional who he thought would help. However, the lawyer evidently failed him by providing wrong advice regarding the form, and failing to identify him or herself on the form, in effect become a "ghost" representative.

[47] The government has been attempting to prevent this kind of nefarious conduct from happening but it unfortunately sometimes happens, and impacts the vulnerable, such as Mr. Huynh. The Board member did not address any of these facts as to why there were issues on the form, despite clear testimony from the Applicant (see pages 485-486, CTR). If the applicant had indeed been trying to conceal the siblings in North America, he would not have written about any of them up on the application form. Furthermore, Mr. Huynh did not try to conceal that he had a brother in Canada during his interview, per his comments in the CAIPS notes from the visa office interview.

[48] The Board member simply finds "The Applicant's reason for not listing all of his siblings in his Application for Permanent Residence is that he was told he did not need to list siblings who lived outside Vietnam". Nowhere did the Board reference the fact that he had retained a representative to assist him given his difficulties with English, who gave him this wrong advice. And nowhere did the Board reference that he indeed listed a sibling in the U.S. on the application form.

Attempt to make first marriage appear longer than it was

[49] The Board member finds that the Applicant was not forthright with the panel, in trying to make her first marriage appear to have lasted longer than it did. The panel ordered the production of the court file regarding her divorce in order to verify the divorce date.

[50] I do not find that the Applicant misled or provided inaccurate information during the hearing. There was some confusion over the divorce date and the separation date, but the Applicant was clear that she and her first husband had made the decision to obtain a divorce in 2004. She was evidently confused about the "divorce" and "separation". Again, the Board member was aware that there was some translation confusion (see page 464, CTR – "MEMBER: I know, it is confusing"). The panel member was also aware that this was a woman with a Grade 7 education.

[51] Unsophisticated parties need to be given some latitude in technical areas, such as Canadian family law: when questioned she made clear the distinction between separation and divorce, and any inconsistencies that first arose were again, in my reading, issues relating to confusion during the hearing, rather than any deliberate attempt to mislead. The Applicant was quite forthright with the fact that the marriage didn't work out, and that the couple had been separated in 2004 and divorced in 2005 by filing divorce papers (see pages 463-465, CTR).

Failure to visit spouse

[52] The Board member found that "in a genuine relationship, the Appellant would make more of an effort to be with her husband".

[53] This finding in and of itself was troubling because the Applicant visited Mr. Huynh in Vietnam each year from 2006 when they met, to 2011 when the CIC interview took place, with the exception of 2010.

[54] Apart from the efforts evidenced that she did make a visit to (and otherwise communicate with) her spouse, the Board member found that the Applicant's reasons for not visiting her husband for one period of nearly two years were unsatisfactory. These reasons provided by the Applicant included the fact that she was afraid to ask for time off work, given its seasonal nature, and the fact that her siblings were not able to care for her ailing mother, so the task fell to her. The Board member wrote "This is not believable, as clearly the Appellant's mother is either cared for or able of [*sic*] cope on her own when the Appellant is working" (Decision at para 27).

[55] I disagree. The Applicant's testimony was perfectly believable on this count. First, the Board member ignored the Applicant's evidence that she was the primary caregiver. She provides completely valid reasons as to why her other siblings could not care for the mother: her sister, who lived in the same house, was ailing from kidney disease (and ultimately had a kidney transplant, per evidence on the record).

[56] The Applicant was thus the primary caregiver for her mother. The mother had a pacemaker put in during the period in question, and was having serious cardiovascular issues, in addition to diabetes. The mother could not take care of herself nor were there others to tend to her: the medical evidence on the record, both with respect to the ailing sister and mother, bore

out the fact that both were very ill. This was all stated in a letter from Ms. Dang's M.D., Dr. Choy, none of which was mentioned in the decision by the Board. The mother has since died.

[57] Quite apart from all of the above, there were the practical difficulties for the Appliant to leave work, which the Board member also failed to address in his finding that the Applicant could have left Canada to spend more time in Vietnam. The Applicant was clear that she needed her job, which was only seasonal, and feared asking for extra time off. She used the money to support herself and her family (including her mother and Mr. Huynh). The Applicant was clear that she collected unemployment insurance in the months she did not work: CTR at p 455. It is a commonly known fact that one is not supposed to be travelling abroad while collecting unemployment insurance. In any event, the Applicant testified that she did not have money, and had to take care of her mother.

Money sent to the husband

[58] With respect to the money sent Mr. Huynh, the Board member found that some of the $7,300 sent over the two years in question (that she did not visit him), in addition to the money spent on their 700 person wedding, could have been directed instead to traveling to Vietnam.

[59] There are several issues with this conclusion. First, this ignores the fact that other than in 2010, the Applicant visited Mr Huynh in Vietnam every year. Second, money sent in support of a husband can certainly be one factor that shows support for a spouse. Third, there is nothing to suggest that the wedding was an opulent affair. Fourth, the mother-in-law testified that she covered the cost of the wedding. When asked "Did you put on a big wedding for your son and

daughter-in-law", she answered "Yes. 60-70 tables". This testimony was not undermined or challenged in any way. There was simply no evidence that the Applicant could therefore have redirected these wedding funds to instead go to visit her husband, if they were not hers to begin with.

Informal attire at wedding

[60] The Board notes "the very informal attire, including flip flops, of some of the guests. This would seem to be indicative of a wedding that was staged hastily and/or to provide a photographic record for immigration purposes".

[61] I simply see no basis for this statement, either in terms of logic, or in terms of testimony before the IAD or visa office. Cultural norms of a wedding may well be different in Vietnam. There was no evidence before the decision-maker about those norms, and I see no evidence tendered or basis for the conclusion. Indeed, even in North America, or elsewhere in the West, weddings are not always formal. Many choose to have informal weddings, (beach weddings, and the like).

[62] The photos of the wedding showed a mix of formally and informally dressed guests. I see no basis to conclude that because of some guests attending in flip flops, the wedding was consequently staged for immigration purposes. Quite the opposite: one would imagine that if it were a sham, the affair would have been far more modest in scope – certainly not a wedding for 700 people. In addition, one would think far fewer guests would have attended, and family and friends would not have travelled from North America, given that this is not a family of great

means. And the Applicant herself would not have spent over two months in Vietnam planning the wedding.

[63] Surely there has to be more indicia than simply one photo of some guests in informal attire, to deem a wedding banquet staged for immigration purposes.

Prior marriage

[64] The Board member found fault with knowledge of the Applicant's earlier divorce. First, he criticizes Mr. Huynh, who "did not know the reasons for the Appellant's divorce". Next, he found that the Applicant's friend, Jenny Chan, "did not know of the Appellant's prior marriage. This is further evidence of the Appellant's lack of candidness, which evidently extends to her close friendships".

[65] I disagree with the Board that Mr. Huynh and Ms. Chan's lack of knowledge about the Applicant's divorce is evidence of a lack of credibility on her part. First the Applicant only knew Ms. Chan since 2007, i.e., after the divorce. Second, it is not a given that people share details about former marriages, whether to a subsequent spouse, or friend. People can be, and often are, embarrassed or hurt about failed marriages, and want to move on from the past and put those events behind them. Ms. Dang's testimony surrounding the prior marriage, and her feelings about it, were entirely consistent with such feelings. Third, what might be common in the West, namely to discuss failed marriages broadly (and I am not in a position to say whether or not this occurs), may not be true of Southeast Asian culture.

Lack of knowledge about Toronto

[66] The Board found it problematic that Mr. Huynh indicated at the interview that he did not know "anything about Toronto, where he presumably intends to live". Again, I do not know what turns on this fact. Again, Mr. Huynh had a basic level of education and is clearly an unsophisticated individual who has been waiting for five years without any progress on his sponsorship and efforts to be reunited with his spouse. Mr. Huynh will presumably better acquaint himself with Toronto if he receives positive news regarding his sponsorship.

Overlooking or failing to mention evidence

[67] The Board member criticized all manner of evidence presented before the Officer and then the Board at the hearing. However, he failed to address plenty of evidence that demonstrated a genuine relationship, including the dozens of pages of phone logs, photographs (other than the one photograph with flip flops) portraying time spent together in Vietnam, and cards exchanged.

[68] The Board member makes statements such as the wedding "allegedly" having 700 guests. DVDs were presented to the Board along with photographs, which could have been viewed to confirm the size of the wedding. This evidence, contradicting the findings of the Board, were not referenced, or presumably, viewed.

[69] In addition, there was compelling medical evidence of the issues that the Applicant confronted, both personally and with respect to her unwell mother and sister. This evidence,

some of which is mentioned above, from her M.D. Dr. Choy, underscored her testimony, but was not addressed or even acknowledged by the Board. This evidence included the fact that the Applicant suffered from depression, as well as "anxiety, poor concentration, fatigue, palpitation and insomnia" as a result of the situation, and that she is medicated with Lorazepam.

[70] The Board member also failed to mention the supportive testimony of those who appeared as witnesses such as the mother, mother-in-law and Jenny Chan, which from a reading of the transcript, and subsequent Affidavits (of Jenny Chan, for instance), were compelling. These individuals attested to the bona fides of the relationship. Neither the Applicant, nor her friend Jenny Chan, were cross examined on their Affidavits dated July 8, 2013 and September 8, 2014, which also buttressed many of the facts reviewed above.

[71] This evidence was either in the written record, or provided by way of live witnesses at the hearing (for instance, the Applicant's friend, mother, and mother-in-law, the latter of whom delayed surgery and travelled from San Francisco to provide said evidence). It was also evident that the Applicant was eager to proceed with the appeal before the IAD, because when the Board asked for an adjournment, the Applicant opposed delay, due to the surgery that the mother-in-law postponed on account of the hearing, who stated at the hearing, "Mainly I want to ask that the reunion of my son and my daughter-in-law. Mainly I have plan to have my surgery for my eyes but I had to come here to testify for them".

[72] The Board cannot overlook key evidence that contradicts its findings without addressing this contradictory evidence: *Cepeda-Gutierrez v MCI*, [1998] FCJ No 1425.

[73] Finally, it should also be noted, in closing, that much of this evidence was summarized for the Board in a submission that accompanied the Divorce certificate that counsel for the Applicant had undertaken to obtain for the Board at the hearing. The Board chose not to address any of counsel's positions in these submissions, either.

[74] In short, on the second issue of reasonableness with respect to credibility and conclusions drawn, I find that the Board, and previously the Officer, both cherry picked weaknesses in the Applicant's testimony which simply does not hold water when one considers all the circumstances, including the education, sophistication, and cultural backdrop.

[75] Furthermore, the Board failed to address positive elements in the case that further undermined those findings. It is trite law that the Board is in the best position to adjudicate credibility. However, when each of the credibility findings has weaknesses, and any apparent inconsistencies can be adequately explained, it is equally as problematic to base a negative decision on those credibility findings in determining that a marriage was entered into for immigration purposes.

C. *Issue 3: Was the Applicant denied procedural fairness?*

[76] Finally, the Applicant alleges that the Officer denied her procedural fairness by consulting with outside sources regarding driver's licenses and using the information obtained to cast doubt on Mr. Huynh's credibility, without giving him notice of the information or an opportunity to respond to it. Given the reasons provided above, I do not feel it necessary to

address this point. Should the Applicant feel the need to address the driver's license issue further at the new hearing, which again will be a *de novo* hearing, she will be able to do so at that time.

VIII. Conclusion

[77] In conclusion, I find the panel's findings to be unreasonable and therefore allow this application. The appeal should be reheard by a differently constituted panel as soon as practicable. The Applicant seeks that the appeal date is set within 30 days of this Judgment. I think it reasonable that the appeal date is set within 60 days of the Judgment, given all the circumstances, including that according to the medical evidence on file, the Applicant is awaiting surgery for tumours, and for this and other reasons, understandably wishes to have this matter dealt with expeditiously.

[78] Counsel did not raise any questions for certification and none arose.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed and the appeal should be reheard by a differently constituted panel as soon as is practicable, and certainly within 60 days of this Judgment.

"Alan Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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