Federal Court  Cour fédérale

Date: 20171018

Docket: IMM-854-17

Citation: 2017 FC 925

Ottawa, Ontario, October 18, 2017

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

HOUR SENG TRIEU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Hour Seng Trieu, seeks judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of the January 27, 2017 decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board which dismissed his appeal of the decision of an Immigration Officer [the Officer] at the High Commission of Canada in Singapore. The Officer had refused to issue a permanent resident visa to Mr. Trieu's wife, My Nga Ngo. The IAD conducted a *de novo* assessment and found that

Ms. Ngo was not a “spouse” within the meaning of section 12 of the Act, and subsection 4(1) of the *Immigration and Refugee Protection Regulations* [the Regulations], because Mr. Trieu had not established that the marriage was not entered into primarily for the purpose of acquiring any status or privilege under the Act or that it is genuine.

[2] Mr. Trieu argues that the IAD erred in law by misunderstanding and/or misapplying subsection 4(1) of the Regulations and that the IAD made an unreasonable decision.

[3] For the reasons that follow, the application for judicial review is dismissed.

I. Background

[4] Mr. Trieu is a 59-year old Canadian citizen of Chinese descent. His wife, Ms. Ngo, who he sought to sponsor to Canada, is a 34-year old resident of Vietnam and is ethnically Chinese.

[5] Mr. Trieu’s introduction to Ms. Ngo was facilitated by Mr. Trieu’s mother who was a friend of Ms. Ngo’s aunt. The couple began an online relationship in March 2011, communicating mostly by video-chat. Without having met in person, Mr. Trieu proposed marriage in October 2011, travelled to Vietnam in December 2011 and married Ms. Ngo in Vietnam later that month, or in early January, 2012 (the evidence is conflicting on the date of the marriage).

[6] Mr. Trieu travelled to Vietnam on four occasions to visit Ms. Ngo; in late 2011 until the time of the wedding in December 2011 or January 2012, later in 2012, in 2014, and in 2015. He had also scheduled a visit for 2016, which was cancelled for medical reasons.

[7] Mr. Trieu applied to sponsor his wife to Canada in March 2012. The couple were interviewed in Ho Chi Minh City, Vietnam in June 2014. The Officer refused the application for a permanent resident visa finding that the requirements of subsection 4(1) were not met and noting, among other things, the differences in their age, discrepancies in their evidence regarding money given by Mr. Trieu to his wife and their lack of knowledge of each other.

[8] Mr. Trieu has been married twice previously. He married his first wife in 1988 and subsequently sponsored her to Canada. Mr. Trieu and his first wife have two children. Their marriage ended in 2003. Mr. Trieu married his second wife in China in February 2008. His sponsorship of his second wife was refused. Mr. Trieu withdrew his appeal of the refusal of sponsorship upon concluding that the marriage would not work out. The marriage ended in 2009.

II. The Decision Under Review

[9] The IAD found that Mr. Trieu had not established on a balance of probabilities that his current marriage was not entered into primarily to acquire any status or privilege under the Act or that it is genuine. Therefore, Mr. Trieu's wife was not a spouse within the meaning of section 12 and could not be sponsored as a member of the family class.

[10] The IAD considered the similarities of Mr. Trieu's present marriage to Ms. Ngo with his previous marriages – particularly his second. The IAD noted that Mr. Trieu acknowledged that he did not know his second wife well. The IAD commented,

> History dictates that at least once, before his current marriage, one of the problems was due to the lack of knowledge of his second wife. This does not bode well …. and that there must be an ulterior motive for the relatively quick marriage and sponsorship, that being for the applicant [Ms Ngo] to acquire status and privilege and as such the premise that the marriage is not genuine.

The IAD added that Mr. Trieu had not "learned from the mistakes of his previous marriages". The IAD characterized this as a continuing pattern and found that this pattern, when assessed with all the facts, can lead to the conclusion that the marriage is not genuine and that it was entered into primarily for the purpose of acquiring status.

[11] The IAD noted the haste at which the marriage occurred – from introduction in March to a proposal in October to a wedding in late December or January. Although Mr. Trieu and his wife stated that they had common interests, the IAD found that they could not describe what these were. The IAD found that there was no credible evidence about how their relationship progressed into a marriage proposal in such a short time frame given it was a long distance relationship without any physical contact.

[12] The IAD reviewed the communication between Mr. Trieu and his wife. The IAD concluded that the video chats and written communication was "general communication not in the marriage realm" and was indicative of a relationship which is not genuine and that was entered into for immigration-law purposes.

[13] The IAD acknowledged that Mr. Trieu visited his wife in Vietnam in 2011-12 leading up to the wedding and again in 2012, 2014, and 2015. The IAD noted, however, that there had been no visit for a 16 month period from late 2012 to May 2014 and that Mr. Trieu and his wife provided different reasons for this gap.

[14] The IAD also acknowledged the testimony of Mr. Trieu's mother, sister and daughter which was supportive of the marriage. However, the IAD found that this testimony was insufficient to overcome its concerns, including regarding the couple's haste in marrying.

[15] The IAD found that there were few similarities between the couple; apart from being ethnically Chinese and that any positive aspects of their relationship were overshadowed by other concerns.

[16] The IAD added that the fact that Mr. Trieu and his wife have remained married for 5 years cannot, on its own, prove that their marriage is genuine, noting that if it were otherwise, "people would just remain in a marriage…without it being genuine, for the primary purpose to obtain status or privilege in Canada".

[17] The IAD considered Ms. Ngo's testimony regarding her future plans in the event that the IAD dismissed the appeal. The IAD found that there had been little thought given to whether the couple would live together in Vietnam noting that "A wait and see attitude does not bode well in this regard and as such impugns the evidence".

III. The Issues

[18] Mr. Trieu argues that the IAD erred in law by confusing and conflating the two parts of the test to determine whether a person is a spouse pursuant to subsection 4(1) of the Regulations. He also argues that the decision is not reasonable: the IAD erred by determining that the marriage was entered into for the purpose of acquiring status for his wife based on his "pattern" or marital history and focusing almost exclusively on his second marriage rather than considering the couple's intentions at the time of their marriage; the IAD ignored evidence regarding the genuineness of the marriage, which was also relevant to the primary purpose of the marriage; and, the IAD erred by assessing the evidence through a Western lens.

IV. The Standard of Review

[19] The appropriate standard of review for the decision of the IAD, which is based on mixed fact and law, is reasonableness. The reasonableness standard focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]). Deference is owed to the decision-maker.

[20] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-15, [2011] 3 SCR 708, the Supreme Court of Canada elaborated on the requirements of *Dunsmuir*, noting that the reasons of the decision-maker are to "be read together with the outcome and serve the purpose of showing whether the result falls

within a range of possible outcomes". In addition, where necessary, courts may look to the record "for the purpose of assessing the reasonableness of the outcome".

[21] The standard of correctness applies to the issue of whether the IAD conflated and confused the two branches of subsection 4(1) of the Regulations; in other words, whether the IAD applied the correct test.

V. The IAD did not err in law; it did not misunderstand or misapply the test set out in subsection 4(1) of the Regulations

[22] Mr. Trieu submits that the IAD conflated or muddled the two parts of the test. He points to several passages in the IAD's decision where it made findings that the marriage was entered into for the purpose of acquiring status under the Act *and* was not genuine, without making a distinct finding on each part of the test and without referring to the specific evidence relied on in support of each part of the test.

[23] For example, Mr. Trieu points to the IAD's comment, "This does not bode well for the appellant's case under review and that there must have been an ulterior motive for a relatively quick marriage and sponsorship, that being for the applicant to acquire status and privilege and as such the premise that the marriage is not genuine".

[24] I agree that this comment suggests that the IAD's conclusion on the genuineness of the marriage was based on its conclusion on the primary purpose rather than based on a separate assessment of its genuineness at the present time. This and other passages referred to by

Mr. Trieu, if read in isolation, could suggest that the IAD did not approach the analysis as a two-part test. However, when the decision is read as a whole, along with the record, it is clear that the IAD properly understood and applied subsection 4(1).

[25] The IAD noted at the outset of its decision that the tests under paragraphs 4(1)(a) and (b) of the Regulations are disjunctive and that to succeed an applicant must show both that the marriage was not entered into primarily for the purposes of acquiring any status or privilege under the Act and that the marriage is genuine. Citing *Gill v Canada (Citizenship and Immigration)*, 2012 FC 1522, [2014] 2 FCR 442 [*Gill 2012*], the IAD noted that the temporal focus of the two parts of the test are distinct. In assessing whether the marriage was entered into primarily for an immigration purpose, the IAD should focus on the time of the marriage; in assessing whether the marriage is genuine, the IAD should focus on the present time.

[26] The decision, read as a whole, reveals that the IAD considered some of the same evidence with respect to both aspects of subsection 4(1) and made some findings with respect to both parts of the test simultaneously. The IAD did not err in doing so. In *Lawrence v Canada (Citizenship and Immigration)*, 2017 FC 369 at para 14, [2017] FCJ No 408 [*Lawrence*], Justice Southcott noted,

> …evidence relevant to one element of the test can also be relevant to the assessment of the other. This point is expressly acknowledged in paragraph 26 of [*Singh v. Canada (MCI)*, 2014 FC 1077, 467 FTR 153], where Justice Brown states his understanding that there may be some overlapping evidence between primary purpose and genuineness, even given the differences in their temporal focus points.

[27] Mr. Trieu further submits that the IAD's conflation of the two parts of the test and its focus on his second marriage caused the IAD to ignore evidence of the genuineness of his marriage. Mr. Trieu submits that evidence of the present genuineness of his marriage is also relevant to the determination of whether the marriage was entered into for an immigration purpose. Mr. Trieu points to the jurisprudence which has relied on the principle that the stronger the evidence of the genuineness of the marriage, the less likely it is that the marriage was for immigration purpose (*Sandhu v Canada (Citizenship and Immigration)*, 2014 FC 834 at para 12, [2014] FCJ No 940 [*Sandhu*]; *Gill v Canada (Citizenship and Immigration)*, 2014 FC 902 at para 15, [2014] FCJ No 923).

[28] As the Respondent acknowledges, the IAD's reasons are more detailed and perhaps stronger with respect to the first part of the test. However, as explained further below, the IAD did not ignore the evidence tendered in support of the genuineness of the marriage. More importantly, evidence of the genuineness of the marriage cannot be used to overcome the findings regarding the purpose at the time of the marriage as this would undermine the proper interpretation of the statutory provision.

VI. The Decision is Reasonable

[29] Mr. Trieu submits that the IAD focussed extensively on his previous marriages to conclude that his present marriage was entered into for the purpose of gaining status or privilege and did not assess the other evidence about the couple's intentions at the time of their marriage. He notes that the jurisprudence has established that the most probative evidence of these intentions is the testimony of the parties (*Gill 2012*, at para 33). Mr. Trieu points to his own

testimony which explained how his current marriage differed from his second marriage. He also points to the couple's communications, visits, exchange of greeting cards and photos.

[30] I agree that the IAD emphasized that Mr. Trieu had been married twice previously, the similarities between his second marriage and the present marriage, and the lessons he should have learned. The IAD overstated Mr. Trieu's marital history as a pattern, given that only his second marriage was short-lived and ill-fated. While Mr. Trieu's first marriage "involved the immigration process", it also lasted for 13 years, and resulted in the birth of his two children. There is no suggestion that his first marriage was not genuine. The IAD's characterization of his second marriage as a mistake and its comments that he should have learned from his second marriage were unnecessary, given Mr. Trieu's acknowledgement that he did not know his second wife very well. However, the IAD did not err in exploring the motivation for the current marriage given that marital history is a relevant consideration (*Khera v Canada (Citizenship and Immigration)*, 2007 FC 632 at para 10, [2007] FCJ No 886). Moreover, the IAD did not rely only on Mr. Trieu's marital history in finding that the marriage was entered into for an immigration purpose.

[31] Contrary to Mr. Trieu's submission, the IAD did not ignore the other evidence regarding the circumstances of the marriage. The transcript of the hearing reveals that this issue was probed extensively. The IAD considered the testimony of Mr. Trieu and his wife regarding their intentions at the time of the marriage and regarding the genuineness of their marriage. For example, the IAD referred to the couple's explanations why they married so quickly. The IAD specifically noted that it had reviewed the communications and the testimony and concluded that

“Based on the evidence, the communication between the appellant ant the applicant, factoring in Vietnamese culture, it does not point to marriage; it points to general communication not in the marriage realm”. These findings clearly address the issue of the couple’s intentions at the time of the marriage.

[32] Mr. Trieu also submits that the IAD ignored strong evidence of the genuineness of his marriage and, as a result, the IAD’s conclusion with respect to both the purpose of the marriage and its genuineness is unreasonable. Mr. Trieu points to the documents provided to the IAD, including: evidence of travel to Vietnam to visit his wife in 2011, 2012 and 2014; pages of texts and web printouts showing continuous communication; dozens of photos before, during and after the wedding; letters of support from friends and family; receipts for money sent by Mr. Trieu to his wife; and, greeting cards exchanged.

[33] Mr. Trieu further submits that the IAD erred by ignoring the jurisprudence which has found that the stronger the evidence of the present genuineness of the marriage, the more likely it is that the marriage was not entered into for a primarily immigration-related purpose (*Sandhu* at para 12; *Lawrence* at para 14). Mr. Trieu reiterates that the IAD focussed almost exclusively on his prior marriage when assessing the primary purpose of his current marriage and, in doing so, foreclosed consideration of the evidence of the genuineness of the marriage which he submits is equally relevant to the assessment of its primary purpose.

[34] I do not agree that the IAD ignored evidence of either the purpose of the marriage or its genuineness. As noted above, the IAD considered some of the same evidence as relevant to both

parts of the test. Although, in some circumstances, evidence of present genuineness may also be relevant to the assessment of the primary purpose of the marriage at the time of the marriage, such evidence is not determinative of the primary purpose. Even if a relationship *is* currently genuine, this would not be sufficient to establish that the marriage *was* not entered into for an immigration purpose. Both parts of the test must be established.

[35] The IAD's assessment of the evidence regarding the genuineness of the marriage was not as detailed as its assessment of the evidence regarding the purpose of the marriage. However, the evidence was not ignored. The IAD noted Mr. Trieu's annual visits to Vietnam and the 16 month gap in 2013-2014. The IAD noted the communications between the couple before their marriage, but concluded these were not indicative of a romantic relationship. The IAD also noted the evidence of the ongoing or current relationship between Mr. Trieu and his wife, including their testimony, and that of Mr. Trieu's family, but did not find it sufficient to establish that the marriage is genuine.

[36] More generally, I do not share Mr. Trieu's view that as a general proposition or principle, the strength of the evidence of genuineness of the marriage is directly related to the purpose of the marriage. It must be recalled that the Regulations were amended in 2010 to clarify that the test is disjunctive and both parts must be satisfied. The jurisprudence which addresses the test as it existed before 2010 must be distinguished. The jurisprudence which has continued to refer to this proposition is based on particular facts regarding the genuineness of the marriage.

[37] In *Lawrence*, Justice Southcott explained how jurisprudence which appeared to take different views on the issue of whether evidence of the genuineness of a marriage could be relevant to whether the marriage was entered into for an immigration purpose, a principle that first arose in the pre-2010 jurisprudence, could be reconciled with the jurisprudence which highlights that subsection 4(1) is a disjunctive test. At paras 14 and 15, Justice Southcott noted,

> [14] … I do not read *Gill 2014* to conflict with the interpretation of s. 4(1) of the IRPR as prescribing a disjunctive test. Rather, the point Justice O'Reilly is making in paragraph 15 of *Gill 2014* is that evidence relevant to one element of the test can also be relevant to the assessment of the other element. This point is expressly acknowledged in paragraph 26 of *Singh*, where Justice Brown states his understanding that there may be some overlapping evidence between primary purpose and genuineness, even given the differences in their temporal focal points. Similarly, at paragraph 12 of *Sandhu*, Justice Martineau states that a finding that the marriage is genuine weighs significantly in favour of a marriage that was not entered into for the primary purpose of gaining status in Canada, although noting that the finding that a marriage is genuine is not determinative of primary purpose.
>
> [15] It is therefore clear that evidence which postdates the time of marriage, and speaks to the genuineness of the marriage (or lack thereof) can be relevant to the assessment of primary purpose. The remaining question is whether the IAD's interpretation of s. 4(1) of IRPR and its failure to take into account such evidence amounts to a reviewable error in the present case. In that respect, Mr. Lawrence acknowledges the decision of Chief Justice Crampton in *Gill v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1522 [*Gill 2012*], at paragraph 32, to the effect that failure to take into account post-marriage evidence does not necessarily constitute an error:
>
> > [32] I acknowledge that evidence about matters that occurred subsequent to a marriage can be relevant to a consideration of whether the marriage was entered into primarily for the purpose of acquiring any status or privilege under the IRPA (*Kaur Gill*, above, at para 8). However, such evidence is not necessarily determinative, and it is not necessarily unreasonable for the IAD to fail to explicitly consider and discuss such evidence.

[38] I agree with Justice Southcott's assessment of the jurisprudence in this regard. In any given case, there *may* be some evidence which supports both the purpose of the marriage at the time it was entered into, and its current genuineness. However, each case must be decided on its own particular facts.

[39] In the present case, the IAD considered some of the same evidence with respect to both parts and found that the marriage was entered into for an immigration purpose *and* that it is not genuine. Given my finding that the IAD did not ignore evidence of genuineness, rather that it found the evidence unpersuasive, Mr. Trieu's submission that the IAD should have considered the strong evidence of the genuineness of the marriage when determining its purpose need not be further explored.

[40] Mr. Trieu also submits that the IAD erred in focusing on the haste of the marriage due to its failure to consider the evidence, including that provided by his sister, that courtships are traditionally fast in his culture. He adds that the IAD erred in referring to Vietnamese culture, given that both he and his wife are ethnically Chinese.

[41] In my view, the IAD's statement that it had taken "Vietnamese culture" into account in assessing the nature of the relationship and marriage is not a serious factual error, rather a reference to the culture of the country where the marriage took place and Mr. Trieu's wife lived. The IAD noted elsewhere in its decision that Mr. Trieu and his wife are ethnically Chinese. The IAD is an expert tribunal and there is no reason to doubt that it considered cultural differences in

assessing the evidence. The IAD was simply not satisfied, despite cultural differences, that the marriage was not entered into for an immigration purpose or is genuine.

[42] In conclusion, the decision read together with the record reveals that the IAD considered both parts of the test in subsection 4(1), considered some of the evidence as relevant to both parts of the test, and made findings on both parts of the test together. The IAD considered whether at the time the marriage was entered into, it was for the purpose of gaining status or privilege and concluded that it was, given all the evidence and particularly the haste in marrying, the lack of evidence regarding the progression of the relationship from on-line chat to romance and marriage, and the lack of evidence of what the couple had in common. The IAD placed significant weight on Mr. Trieu's second marriage, which it overstated as a pattern. However, it was open to the IAD to consider this history, which as noted, was not the only factor in support of the IAD's conclusion that the marriage was entered into to acquire status or privilege.

[43] The IAD also assessed the genuineness of the marriage, with reference to some of the same evidence, including the communication between the couple, the gap in their visits, and their inability to describe common interests. The IAD did not ignore the evidence presented, but was not persuaded by it. The IAD also considered other evidence, which it found to be "neutral", including the large age gap and the discrepancies regarding money provided by Mr. Trieu to his wife.

[44] The decision of the IAD as a whole is justified, transparent and intelligible and the outcome is defensible based on the facts and the law.

JUDGMENT IN IMM-854-17

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.

2. No question is certified.

"Catherine M. Kane"
Judge

ANNEX A

The Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

Family reunification	**Regroupement familial**
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.

Immigration and Refugee Protection Regulations, SOR/2002-227

Bad faith	**Mauvaise foi**
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.

FEDERAL COURT

SOLICITORS OF RECORD

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