

Federal Court



Cour fédérale

Date: 20190712

Docket: IMM-4393-18

Citation: 2019 FC 923

Ottawa, Ontario, July 12, 2019

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

KY LUU PHAN

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Defendant

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicant, Mr. Ky Luu Phan [Mr. Phan], applied for the judicial review of a decision rendered by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada dated August 17, 2018. The IAD dismissed Mr. Phan's appeal of a visa officer's decision [Officer] refusing his application to sponsor his spouse, Ms. Nga Thi Le Doan [Ms. Doan], a

Vietnamese citizen, as a member of the family class under subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[2] The IAD upheld the Officer's decision dismissing the sponsorship application after finding the couple's marriage was either entered into primarily for the purpose of acquiring any status or privilege under the *Immigration and Refugee Protection Act* SC 2001, c 27 [IRPA] or is not genuine as provided under subsection 4(1) of the IRPR:

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.

[3] For the reasons that follow, the Court finds that the IAD's decision is reasonable and the application for judicial review is dismissed.

II. Facts

[4] Mr. Phan was born in Vietnam, arrived in Canada in 1994, and is now a Canadian citizen. He claims that he met Ms. Doan at the end of a trip to Vietnam in late June 2012 and they celebrated their marriage in Vietnam in early 2013. Mr. Phan claims that Ms. Doan's aunt was

involved in their introduction to one another. Neither spouse had ever been previously married. Mr. Phan works for a restaurant in Canada while Ms. Doan works for a restaurant in Vietnam where she has always resided.

[5] On July 9, 2013, Mr. Phan applied to sponsor Ms. Doan's application for a permanent resident visa from outside of Canada as a member of the family class. In submissions to the Case Processing Centre in support of the sponsorship application, counsel for Mr. Phan and Ms. Doan stated that they met at the restaurant where Ms. Doan worked in Vietnam on June 28 and 29, 2012. Upon his return to Canada on July 1, 2012, the couple began corresponding through phone calls, speaking three or four times each week. According to these submissions, Mr. Phan proposed to Ms. Doan over the telephone on August 27, 2012 and they celebrated an official engagement ceremony in Vietnam on October 14, 2012. They celebrated their marriage in Vietnam in one ceremony for each spouse's family on January 27, 2013, and on February 1, 2013, and subsequently, honeymooned in Vietnam. According to Mr. Phan's testimony before the IAD, he remained in Vietnam until March 2013 and visited her there again in October 2016.

[6] According to the Officer's Global Case Management System [GCMS] notes, he interviewed Ms. Doan on August 31, 2015, with the assistance of a Vietnamese interpreter. According to the GCMS notes, the Officer called Mr. Phan on the phone on September 7, 2015, to ask him questions.

[7] In the GCMS notes, the Officer noted inconsistencies between the responses of Mr. Phan and Ms. Doan for a number of reasons. The Officer remarked doubts about the

marriage's credibility and each spouse's superficial knowledge of each other. For these reasons, the Officer concluded that the couple did not establish that their marriage was genuine and that it was not entered into primarily for the purpose of acquiring a status or privilege under the IRPA. On September 8, 2015, the Officer provided the couple with a formal decision letter dismissing Ms. Doan's application for permanent residence, relying on subsection 4(1) of the IRPR and subsection 11(1) of the IRPA. On September 30, 2015, Mr. Phan appealed the Officer's decision to the IAD.

[8] The IAD held oral hearings on November 14, 2017, February 20, 2018, and June 15, 2018 at which Mr. Phan and his uncle testified, while Ms. Doan testified from Vietnam over the phone.

[9] Ultimately, the IAD dismissed the appeal on August 17, 2018. Mr. Phan applied for judicial review of the IAD's decision under subsection 72(1) of the IRPA on September 7, 2018.

III. Decision under review

[10] In first addressing the genuineness of the marriage, the IAD noted inconsistencies in the testimony before it and statements made to the Officer. Namely, the IAD took issue with inconsistencies about whether the couple met by chance at the restaurant or were introduced by Ms. Doan's aunt, as well as inconsistencies about who was present during their first two encounters, and the time of day when they first met.

[11] The IAD noted Mr. Phan's testimony that he met Ms. Doan's aunt at a refugee camp in Indonesia in 1991, that he reconnected with the aunt in Canada, and she gave him Ms. Doan's contact information. Thereafter, Mr. Phan testified that he called Ms. Doan to introduce himself and arranged to meet her at the restaurant where she worked. While Ms. Doan's testimony before the IAD was consistent with this account, she previously told the Officer that no one introduced her to Mr. Phan and she met him at the restaurant when he came for a meal, and that he only obtained her phone number after meeting her at the restaurant a second time. The IAD further noted that in her Sponsored Spouse/Partner Questionnaire Ms. Doan answered "No" to a question asking if anyone introduced her to Mr. Phan and she did not mention that her aunt introduced them in the additional details section.

[12] The IAD stated that the two significantly different accounts advanced by Ms. Doan about how she and Mr. Phan met is a serious credibility concern. In the IAD's view, if the couple's relationship is genuine, it would be reasonable to expect Ms. Doan to provide a generally consistent account of how she met Mr. Phan. The IAD was also not satisfied with Ms. Doan's explanation that it has been a long time and she does not remember.

[13] The IAD took further issue with inconsistencies between the testimony of Mr. Phan and Ms. Doan about who was present each time they met at the restaurant which it also found seriously undermined their credibility.

[14] Mr. Phan testified that during the first encounter, he was accompanied by his sister and his niece and Ms. Doan testified the same. However, Mr. Phan told the Officer that he was

accompanied by his nephew while Ms. Doan said that he was accompanied by his niece.

Regarding the second restaurant visit, Mr. Phan told the Officer that he was accompanied by his sister while Ms. Doan told the Officer that he was accompanied by his niece. Before the IAD, Mr. Phan testified that he was accompanied by the nephew because the sister and niece were busy.

[15] Ms. Doan testified that the first meeting occurred at 8:00 or 9:00 p.m. but told the Officer that it took place at 11:00 a.m.. The IAD found this undermined her credibility because she readily provided inconsistent timeframes without stating that she could not remember correctly. The IAD stated that her testimony is unreliable and untrustworthy and that she has a propensity to advance conflicting evidence.

[16] With respect to evidence of communication, the IAD noted their testimony that they sent each other text messages through a telephone application. The IAD also acknowledged that they presented evidence of communication through the telephone application between September 2014 and October 2016. However, the IAD remarked that other than four envelopes, they did not present evidence of communication between June 2012 and August 2014. The IAD found that such records should have been available from Mr. Phan's telecommunications provider. The IAD found that this undermined their allegations that they communicated since they met and the lack of evidence establishing communication before the wedding undermines their credibility about how the relationship developed.

[17] The IAD took issue with their testimony about how their relationship developed from their meetings on June 28 and June 29, 2012, and the proposal of August 27, 2012. The IAD found that the evidence about how their relationship developed in the two months following their meeting as “vague, lacking in detail, and does not convey a fulsome understanding of how the relationship developed.” Essentially, the IAD was not satisfied with their explanation that they spoke about their lives, their interests, work, and family, and that after getting to know each other they became “girlfriend and boyfriend” without providing further details.

[18] The IAD went on to note several further credibility concerns. First, Ms. Doan told the Officer that she has two aunts living in Canada and Mr. Phan does not reside with either aunt but instead lives alone. Conversely, Mr. Phan told the Officer that he was residing with Ms. Doan’s aunt at her house. When the IAD member asked her to explain the inconsistency, Ms. Doan stated that she did not have rent receipts when the Officer asked her and she did not remember Mr. Phan’s living situation at that time. Mr. Phan said that Ms. Doan’s aunt instructed her not to tell the Officer that Mr. Phan was living at her house because she did not want to be taxed on the rental income and that he was angry when he found out what Ms. Doan’s aunt had suggested. The IAD noted however that Ms. Doan did not acknowledge that her aunt directed her to withhold information.

[19] From these facts, the IAD held that if Ms. Doan was untruthful, and that her integrity and reliability as a witness should be put in serious doubt. Conversely, if she was unaware of Mr. Phan’s living situation, this would raise concerns regarding the genuineness of the relationship

because genuine spouses would know basic facts about their partner's living circumstances, such as where and with whom they live.

[20] The IAD further noted from Ms. Doan's testimony that she twice applied for Canadian student visas and both applications were refused. However, in her permanent residence application forms, she stated that she had never been refused a temporary resident visa to Canada. As such, Ms. Doan provided inconsistent evidence relating to her immigration history. The IAD further noted that in one student visa application, she stated that she had taken restaurant-management college courses and stated that she received a diploma in her permanent residence application. However, before the IAD she testified that she only had a high school education and when asked if she studied at College she confirmed that she only undertook high school studies. The IAD held that while Ms. Doan's education history may not be directly relevant to the genuineness of her marriage, it nevertheless diminishes her reliability and credibility.

[21] The IAD acknowledged the evidence of money transfers from Mr. Phan to Ms. Doan, communication records from September 2014 to October 2016, and photographs of their trip to Vietnam in 2016. However, this evidence could not overcome the credibility concerns, inconsistencies, and the insufficient evidence of communication and development of the relationship which collectively undermine the genuineness of their marriage which was not established on a balance of probabilities.

[22] The IAD then held that “if evidence leads to a finding that a marriage is not genuine, then there is a presumption that it was entered into for the purpose of gaining status. The burden of establishing a contrary purpose should be placed squarely on the applicant” and that the burden was not met in this case (*Kaur v Canada (Citizenship and Immigration)*, 2010 FC 417 at para 16 [*Kaur*]). In particular, Mr. Phan did not mention in his sponsorship application that Ms. Doan’s student visa applications had been refused. The IAD then held that, on a balance of probabilities, the marriage was entered primarily for the purpose of acquiring status or privilege under the IRPA.

IV. Issues

[23] This application raises a single material issue:

- A. *Did the IAD commit a reviewable error by concluding that the couple’s marriage was not genuine and that it was entered into primarily for the purpose of acquiring a status or privilege under the IRPA?*

V. Standard of review

[24] The IAD’s finding that a marriage is not genuine or that it was entered into primarily for the purpose of acquiring a status or privilege under the IRPA is reviewable on a reasonableness standard, as it raises questions of fact and law (*Shahzad v Canada (Citizenship and Immigration)*, 2017 FC 999 at para 14; *Al Mousawmaii v Canada (Citizenship and Immigration)*, 2018 FC 1256 at para 12 [*Al Mousawmaii*]).

VI. Analysis

[25] Mr. Phan submits that in assessing the two prongs of subsection 4(1) of the IRPR, the IAD had to take into account all of the evidence, including post-marriage evidence of the couple's mutual commitment (*Lawrence v Canada (Citizenship and Immigration)*, 2017 FC 369 at paras 9-11 [*Lawrence*]). He argues that the IAD did not consider the evidence demonstrating the marriage's authenticity, namely post-marriage evidence. Rather, the IAD committed a reviewable error by limiting its decision to credibility concerns which amounted to a microscopic examination of the evidence. In Mr. Phan's view, these credibility findings could not diminish the other credible evidence before the IAD. Mr. Phan further submits that these credibility findings were not based on inconsistent testimony before the IAD. Rather, these findings were based on inconsistencies between the statements each spouse made to the Officer and between what they said to the Officer and before the IAD.

[26] Mr. Phan further remarks that before the IAD, he submitted evidence of the couple's communication, cohabitation, consummation of the marriage, expression of love and affection, financial support, and that family participated in their wedding ceremony. In his view, all of these factors are indicators of a genuine marriage. Mr. Phan emphasizes that the level of continuing communication and contact between the couple shows significant mutual knowledge of their daily lives, including family and work issues, and demonstrates that their marriage is genuine. Mr. Phan further challenges the IAD's finding that there was insufficient communication between 2012 and 2014 because in doing so it essentially disregarded the extensive text message communication evidence from 2014 to 2016.

[27] The Respondent submits that in September 2010, subsection 4(1) of the IRPR was amended to clarify that the “bad faith” test for spousal relationships is disjunctive which permits the refusal if either of the two requirements (genuineness or intention) is not met and intent is inferred from the parties’ conduct. Moreover, there is no single method of analysis to determine if a relationship is genuine and credibility is a central aspect of the determination (*Keo v Canada (Citizenship and Immigration)*, 2011 FC 1456 at para 23).

[28] The Respondent also argues that Mr. Phan’s arguments take issue with the IAD’s weighing of evidence and findings of fact regarding the primary purpose and genuineness of the couple’s marriage. The Respondent endorses the credibility findings which it argues were open to the IAD and were based on the record. The Respondent submits that the IAD reasonably concluded that the couple’s evidence was vague and general in nature and the IAD’s concerns about how the couple met and how their relationship developed were reasonable and highly relevant.

[29] The Respondent further submits that the IAD did not ignore relevant evidence. While the couple provided “voluminous materials” this is not akin to providing credible or trustworthy evidence about how their relationship began and developed. The Respondent notes that the IAD took issue with the lack of communication evidence prior to 2014 and that this was important because of other credibility issues relating to that period. In the Respondent’s view, it was proper for the IAD to draw a negative inference from the failure to provide corroborative evidence of communication. Moreover, the IAD noted the photographic evidence, and evidence of money transfers and it was reasonable to conclude that this did not overcome the credibility concerns.

[30] As the parties have recognized, there does not appear to be a bright line test for exclusion findings under subsection 4(1) of the IRPR and the IAD may consider a number of factors to make its determination. Comments from a previous IAD decision in *Chavez v Canada (Minister of Citizenship & Immigration)*, [2005] I.A.D.D. No. 353 at para 3 [*Chavez*], which has been followed by many other panels, notes factors that are relevant in the assessment under subsection 4(1) of the IRPR which are included but not limited to the following (*Pabla v Canada (Citizenship and Immigration)*, 2018 FC 1141 at para 27):

...the intent of the parties to the marriage, the length of the relationship, the amount of time spent together, conduct at the time of meeting, at the time of an engagement and/or the wedding, behaviour subsequent to a wedding, the level of knowledge of each other's relationship histories, levels of continuing contact and communication, the provision of financial support, the knowledge of and sharing of responsibility for the care of children brought into the marriage, the knowledge of and contact with extended families of the parties, as well as the level of knowledge about each other's daily lives.

[31] Moreover, put simply, the disjunctive test for subsection 4(1) of the IRPR requires assessment of intention at the time of the marriage, or primary purpose, under paragraph a, and the authenticity of their marriage at the present time, or genuineness, under paragraph b (*Al Mousawmaii* at para 15). It would appear that the *Chavez* factors could be relevant to making a determination under either paragraph. Moreover, adverse credibility findings are certainly relevant to the IAD's assessment of subsection 4(1) of the IRPR (*Truong v Canada (Citizenship and Immigration)*, 2017 FC 422 at paras 30-40 [*Truong*]). Since the test is disjunctive, a foreign national who originally entered into a marriage for the purpose of acquiring a status or privilege, but whose marriage grew into a genuine marriage over time is nevertheless excluded from the family class (*Singh v Canada (Minister of Citizenship and Immigration and Minister of Public*

Safety and Emergency Preparedness), 2014 FC 1077 at para 7; *Alcina Rodriguez v Canada (Citizenship and Immigration)*, 2018 FC 995 at para 66).

[32] With this in mind, the Court does have certain reservations about the IAD's decision. Namely, the IAD raised a number of credibility concerns that appear to concern the couple's intentions at the time they were married, such as the consistency of their statements to the Officer and the lack of communication evidence from the first two years of their relationship, under a section entitled "Genuineness of the marriage" (IAD reasons at paras 4-23). At the end of its decision, in a section entitled "Primary purpose" the IAD stated that where it is shown that the marriage is not genuine, then it can presume that the primary purpose, at the time of the marriage, was to gain status and reiterated its credibility issues found in its genuineness section (IAD reasons at para 24; relying on *Kaur* at para 16).

[33] It would appear that most of the inconsistencies raised by the IAD bear on the primary purpose at the time of the marriage and general credibility of the couple, and less so whether or not the marriage is currently genuine. Moreover, the Court agrees with Mr. Phan that evidence of commitment after the marriage itself can be relevant to "primary purpose" determinations (*Lawrence* at para 18; *Gill v Canada (Citizenship and Immigration)*, 2014 FC 902 at para 15). In other words, evidence that a marriage is genuine (based on post-marriage conduct) weighs favourably in assessing the marriage's primary purpose. However, the IAD concluded that the marriage is not genuine by primarily relying on credibility and considerations relevant to the couple's intention prior to their marriage and then, for that reason, drew a presumption that the primary purpose was to gain a status or privilege under the Act.

[34] As such, the IAD's characterization of the two prongs and the "presumption" it drew might not have been entirely proper. That being said, for the following reasons, the Court finds this was not material or otherwise amounted to a reviewable error.

[35] The numerous inconsistencies that the IAD noted *are* material and reasonably support its bad faith marriage finding. In this regard the IAD noted inconsistencies before the Officer about who was present when the couple met, whether or not they were introduced by Ms. Doan's aunt, Ms. Doan's failure to disclose two prior temporary residence applications, untruths about whom Mr. Phan was living with in Canada, and the complete absence of communication evidence between July 2012 and August 2014 apart from four envelopes. Not only were these findings relevant to the couple's true intention at the time they married in Vietnam, but the IAD was certainly entitled to approach their testimony and evidence with elevated scrutiny in light of its credibility findings which did not necessarily bear directly on their intentions at the time they married (*Truong* at para 30). Moreover, this Court has held that, while not determinative, a failure to disclose past immigration history is a relevant consideration in the assessment of the *bona fides* of a marriage (*Nelson v Canada (Citizenship and Immigration)*, 2018 FC 1139 at para 18; *Aburime v Canada (Citizenship and Immigration)*, 2015 FC 194 at para 23).

[36] The Court notes, with respect, that Mr. Phan's reliance on *Lawrence* is misplaced. In that decision, the IAD failed to take the couple's subsequent conduct into account when assessing their primary purpose and essentially declined to consider that evidence. However, in the present case, the IAD expressly considered the evidence before it, albeit when addressing what it referred to as the genuineness of the marriage. It is apparent that the IAD considered this

evidence in its analysis and ultimately chose to give the credibility findings greater weight in concluding that, on a balance of probabilities, the couple entered into a bad faith marriage:

[23] While I acknowledge that the [Mr. Phan] and [Ms. Doan] provided testimony of their future plans to open a business in Canada and [Mr. Phan] has provided documentary evidence of money transfers to [Ms. Doan] as well as communication records from September 2014 to October 2016 and photographs of [Mr. Phan's] return trip to Vietnam in 2016, I find, on a balance of probabilities, these aspects are insufficient to outweigh or address the credibility concerns that have arisen.

[37] Ultimately, a finding that credibility concerns outweigh other evidence regarding the genuineness of a marriage is directly within the IAD's jurisdiction; on judicial review, this Court is not to reweigh the evidence that precipitated that finding (*Parmar v Canada (Citizenship and Immigration)*, 2018 FC 323 at para 25). Moreover, it is apparent from the IAD's reasons that it did not ignore relevant evidence.

[38] While Mr. Phan may disagree with the IAD's determination, the Court finds that, as a whole, the IAD's determination that Ms. Doan is excluded from the family class under 4(1) of the IRPR is within a range of reasonable outcomes. Nothing in the record squarely contradicts its conclusions or decision to ascribe greater weight to the inconsistencies and negative credibility findings that it drew (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL), 1998 CanLII 8667 (FC) at paras 16-17). The Court notes that the IAD weighed all of the evidence before it and ultimately provided reasons that are sufficiently justified, transparent, and intelligible to withstand this Court's intervention (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47).

[39] The Court is of the view that the IAD's determination that the couple entered into a bad faith marriage was open to it to make and that this Court's intervention is not warranted.

VII. Conclusions

[40] For these reasons, the Court finds that the IAD's decision is reasonable. The application for judicial review is dismissed. There is no question of general importance for certification and none arises.

JUDGMENT in IMM-4393-18

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

There is no question of general importance for certification and none arises. There is no order as to costs.

“Paul Favel”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4393-18

STYLE OF CAUSE: KY LUU PHAN v MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: APRIL 4, 2019

JUDGMENT AND REASONS: FAVEL J.

DATED: JULY 12, 2019

APPEARANCES:

Wennie Lee FOR THE APPLICANT

Gordon Lee FOR THE DEFENDANT

SOLICITORS OF RECORD:

Lee and Company FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

Attorney General of Canada FOR THE DEFENDANT
Toronto, Ontario