

Federal Court



Cour fédérale

Date: 20190801

Docket: IMM-541-18

Citation: 2019 FC 1035

Ottawa, Ontario, August 1, 2019

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

THANH TRAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Thanh Tran, seeks judicial review of a decision of the Immigration Appeal Division [IAD] dated January 12, 2018 [Decision]. The IAD dismissed his appeal of a March 10, 2014 decision made by an Immigration Officer at the Canadian High Commission in Singapore [Visa Officer], who refused to issue a permanent resident visa to Mr. Tran's wife, Thiu Thu Thao Doan.

II. Background Facts

[2] Mr. Tran was born in Vietnam on October 10, 1981. He obtained permanent resident status in Canada on March 21, 2007 as result of a successful sponsorship by his ex-wife Que Thi Hoang. In early 2009, this marriage began to have problems during which time they eventually separated but continued to live in the same house. On January 6, 2011, they were divorced.

[3] Ms. Doan was born in Vietnam on March 29, 1983. She first met Mr. Tran in November 2002 at college where they were just classmates. She next connected with him in June 2009 when he was in Vietnam visiting family. In November 2010, their relationship became romantic and on January 24, 2011, they were married.

[4] The sponsorship application under review was filed on November 1, 2011. After preliminary assessment by Citizenship and Immigration Canada, Mr. Tran and Ms. Doan were convoked for an interview which was held on March 3, 2014. The interview was conducted in Vietnamese using an interpreter. No issue arises from the interpretation.

[5] On March 10, 2014, the Visa Officer determined that Mr. Tran and Ms. Doan had not satisfied them that their marriage was genuine or that the primary reason for their marriage was other than for the purpose of gaining admission to Canada.

[6] On April 3, 2014, Mr. Tran appealed the Visa Officer's determination to the Immigration Appeal Division. The appeal was heard over three days - December 22, 2016, April 10, 2017 and December 12, 2017. Mr. Tran testified in person and was assisted by counsel while Ms. Doan

testified by teleconference from a hospital in Vietnam where she had been under medical care for five days in connection with her pregnancy of, at that time, seven weeks. The Minister relied on the Record, cross-examined the parties and made oral submissions to the IAD.

[7] On January 12, 2018, the IAD found that Mr. Tran had not proven on a balance of probabilities that his marriage to Ms. Doan was genuine and that it was not entered into primarily for the purpose of acquiring any status or privilege under the *IRPA*. Accordingly, the appeal was dismissed by the IAD.

III. Legislation

[8] In this application, subsection 4(1) the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] applies:

Bad faith

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

(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or

(b) is not genuine.

Mauvaise foi

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) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;

b) n'est pas authentique.

[9] If it is found either that the marriage was entered into primarily for the purpose of acquiring a status or privilege under IRPA or the marriage is not genuine, then there is no spousal relationship to anchor a permanent residence application.

IV. The Decision under Review

[10] The IAD reviewed the background facts then confirmed that the onus was on Mr. Tran to demonstrate on a balance of probabilities that neither of the two prongs of subsection 4(1) apply to his relationship with Ms. Doan. It noted that while the test formerly was conjunctive, as of September 30, 2010 it was disjunctive and in order to succeed, Mr. Tran was required to prove that neither test applied to his marriage to Ms. Doan.

[11] The IAD reviewed in some detail that it is not easy to assess the genuineness of a marriage and that no two cases are alike given that a number of factors, of which examples were provided, can be considered.

[12] The IAD conducted a *de novo* hearing. In addition to the testimony of Mr. Tran and Ms. Doan, the documentary evidence and the written submissions of the parties, the IAD reviewed the Visa Officer's notes of an interview conducted with Mr. Tran and Ms. Doan on March 3, 2014. The notes mentioned the Visa Officer's concerns with the application and discrepancies that were noted in their answers. The Visa Officer's opinion was that the story of the development of their relationship was of poor quality and there was a lack of detail in response to questions.

[13] The IAD found that four years after the Visa Officer's interview there were still too many unanswered questions as to how the relationship matured and led to marriage. The IAD said there was a "void of information" as result of which it was not able to understand how their relationship progressed as quickly as it did from reconnecting in June 2009 to the proposal in November 2010. The IAD concluded that the evidence provided by Mr. Tran and Ms. Doan was not credible, trustworthy or reliable enough to overcome the concerns of the Visa Officer or of the IAD itself.

[14] The IAD made several negative inferences and findings about the relationship, the quality of the evidence, the speed with which the marriage occurred, contradictory statements by Mr. Tran and Ms. Doan, Mr. Tran's reluctance to move to Vietnam if the application was rejected, the purpose of his trips back to Vietnam over the years and the amount of money he sent to Ms. Doan.

[15] The IAD noted there was a positive factor in that Mr. Tran and Ms. Doan would like to have a child and Ms. Doan had been treated for infertility. At the time of the hearing, she was seven weeks pregnant, although hospitalized for bleeding. She had been pregnant twice before but miscarried each time. The IAD found that positive factor did not override the problems that had been identified in the evidence. In addition, it was noted that neither Mr. Tran nor Ms. Doan had any family in Canada while their parents and siblings all lived in Vietnam.

[16] The IAD acknowledged that not all relationships or marriages are "cut from the same cloth" and people react differently to problems, sometimes in ways that may not seem normal to

the average person. It found that in the immigration context, marriage was to be assessed as a whole by balancing a variety of indicators.

[17] In dismissing the appeal, the IAD found that there was evidence of some compatibility between Mr. Tran and Ms. Doan. On considering the evidence cumulatively, the IAD found that the marriage was not genuine and it was entered into with a view by Ms. Doan of obtaining a status or privilege in Canada.

V. Issue and standard of review

[18] The only issue is whether the IAD erred in concluding that the marriage between Mr. Tran and Ms. Doan was not genuine and that it was entered into primarily for the purpose of acquiring a status or privilege under the *IRPA*. That is a question of fact reviewable on the standard of reasonableness: *Sandhu v. Canada (Citizenship and Immigration)*, 2014 FC 1061 at para 20 [*Sandhu*].

[19] A decision displays the hallmarks of reasonableness if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*].

[20] If the reasons, when read as a whole, “allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range

of acceptable outcomes, the *Dunsmuir* criteria are met”: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Nfld Nurses*].

VI. Analysis

[21] It is important to remember that Mr. Tran bore the onus on appeal to convince the IAD that, on a balance of probabilities, his marriage to Ms. Doan was genuine and was not entered into for the purpose of acquiring any status or privilege under the *IRPA* such as becoming a permanent resident of Canada: *Zheng v Canada (Citizenship and Immigration)*, 2011 FC 432 [*Zheng*] at para 18.

[22] There is no single indicator of genuineness of a marriage. It has been confirmed many times in the jurisprudence that there is no specific test established for such a determination.

[23] Through the consideration of a number of factors showing the interdependence and interconnectedness of two people, the IAD will assess whether the balance of probabilities has tipped in favour of the genuineness of the marriage: *Keo v Canada (Citizenship and Immigration)*, 2011 FC 1456 at paras 22 and 24.

A. *The Development of the Marital Relationship*

[24] Mr. Tran's position is that the IAD made an unreasonable finding when it concluded that he was not credible because his answers describing the development of his relationship with Ms. Doan were vague.

[25] With respect to that finding, Mr. Tran says that the IAD failed to take into account cultural differences. Mr. Tran and Ms. Doan are from a culture that is more reserved when expressing and talking about romantic and personal subjects. He states the result is that the IAD perceived his answers as vague or simple when in fact they were culturally appropriate.

[26] That is the same submission that Mr. Tran made to the IAD about the Visa Officer's findings. In his written submissions to the IAD Mr. Tran acknowledged that the IAD is a specialized tribunal who hears from various cultures on a regular basis. He told the IAD that it "will be able to differentiate one from the other." In other words, Mr. Tran relied upon the IAD in the *de novo* appeal to know whether the answers he gave were simplistic and vague or were culturally appropriate.

[27] The IAD having made the determination that his answers were vague, Mr. Tran now says that the IAD failed in its assessment of the evidence before it by not considering it in a manner that was sensitive to the social and cultural context of Mr. Tran and Ms. Doan.

[28] I disagree.

[29] Although Mr. Tran did state that culturally he and Ms. Doan do not readily express and talk about personal subjects, he was aware that the onus was on him to show the genuineness of his marriage. Mr. Tran did discuss his two marriages, including many personal details.

[30] The IAD displayed cultural awareness when it stated that not all relationships and marriages are “cut from the same cloth” and it had to consider the evidence cumulatively while balancing the various factors.

[31] The IAD was aware that the importance of individual factors will vary and assessing the genuineness of a marriage in the immigration context is not easy. The IAD recognized that people react to problems differently and at times their reactions and behaviour will not appear natural or normal compared to the average person.

[32] A review of the transcript shows that Mr. Tran discussed both his first marriage and his current marriage. He discussed separating from his first wife although he “still loved her”. He also described living in the house with her after they separated and then moving to a nearby house. He discussed how he and Ms. Doan wanted to have children but that they were having difficulty conceiving. He described why that was and how they were trying to address it through treatment and medication. He provided quite a number of very personal details regarding their attempts to have a child.

[33] Possible cultural differences are but one of the factors to be considered. The IAD listed a number of other factors from the case law — nine in total — and throughout the Decision balanced the positive and negative factors it found.

[34] For example, the IAD found the positive factor that Mr. Tran and Ms. Doan have the same language and culture by way of being born in Vietnam did not outweigh the material

problems it found. Those problems included significant issues with the progress of the marital relationship from being former classmates in 2002, who did not stay in touch and did not have a romantic relationship during that time, to Mr. Tran contacting Ms. Doan in June 2009 when he was visiting his grandfather. The evidence was that when Mr. Tran left Vietnam in July 2009 he and Ms. Doan were still just friends although he subsequently called her at which time they spoke about family, life and school.

[35] The IAD was concerned that the evidence was unclear regarding whether Mr. Tran's calls to Ms. Doan actually took place in July 2009 or mid-2010. It was a legitimate concern. The phone logs only show calls during the period of August 2010 to November 15, 2012. On that evidence I am not able to find that the IAD erred in its analysis.

B. *Three Key pieces of evidence*

[36] Mr. Tran also submits that three central pieces of evidence were erroneously dismissed by the IAD. If they had been accepted, they would have supported a positive credibility finding.

(1) *Pregnancy of Ms. Doan*

[37] The IAD found that the desire of Mr. Tran and Ms. Doan to have a child was a positive factor but it did not override the problems with the other evidence.

[38] Mr. Tran submits that Ms. Doan's pregnancy at the time of the IAD hearing was not just "a factor" as the birth of a child is ordinarily enough to dispel concerns about the genuineness of

a marriage. He acknowledges it is not determinative but says it would have gone a long way to establishing the genuineness of their relationship.

[39] The main problem with that submission is that it amounts to a request to this Court to reweigh the evidence. The IAD found that the pregnancy was a positive factor but it was not determinative.

[40] The IAD did not commit any error in considering Ms. Doan's pregnancy. In carrying out its statutory mandate, the IAD reasonably weighed and balanced the factors. The finding it made was well within the range of possible, acceptable outcomes based on the facts and law.

(2) Mr. Tran's trips to Vietnam

[41] Between July 2012 and September 2017, Mr. Tran made six trips to Vietnam four of which were approximately one month in duration and two of which were for three months. He alleges the IAD engaged in pure speculation when it found that there was a lack of sufficient credible evidence to show he visited Ms. Doan given that he had many family members in Vietnam.

[42] The evidence confirms that all of the family of both Mr. Tran and Ms. Doan are in Vietnam. They have no family in Canada. The purpose of Mr. Tran's first trip back to Vietnam, which was when he contacted Ms. Doan, was to visit his grandfather who was in poor health. The underlying record does not contain sufficient evidence to establish the purpose of the various trips. It may well be that he had a dual-purpose of visiting both Ms. Doan and his family.

Regardless of that, the fact is that Mr. Tran did not meet his onus to prove on a balance of probabilities that the purpose of each trip was to be with Ms. Doan to further the marital relationship.

[43] While Mr. Tran points to and critiques several individual findings made by the IAD, it is clear that the evidence was considered as a whole, in context. In that respect, there is another aspect to Mr. Tran's trips to Vietnam which bears mention relating to the genuineness of the marriage.

[44] During the hearing before the IAD, Mr. Tran was questioned about whether he would move to Vietnam if the sponsorship application was denied. He acknowledged that his wife had asked him to move to Vietnam and they had discussed it. He had indicated that he would not move to Vietnam because "life is better in Canada".

[45] Under questioning, Mr. Tran indicated that if his wife could not come to Canada he would visit her more often before he would come to a decision. He stated that "eventually, if she cannot be here, eventually I will have to go back there." This statement was made at a time when they had already been married for seven years. During that period, they had both been physically present in Vietnam for a total of only 10 months and not at all in the year 2013.

[46] The IAD was obliged to consider those statements in assessing the genuineness of the marriage of Mr. Tran and Ms. Doan.

[47] The IAD had no supportive evidence that the purpose of Mr. Tran's trips were to foster his marital relationship. He simply did not meet the onus upon him to show that was the purpose.

[48] The telephone logs in the record do not provide evidence of a purpose for the trips. The various photos provide some evidence of purpose but in two of the three cases it was not for the purpose of fostering his own marriage; it was to attend weddings – either his brother's in June 2014 or a friend's wedding in 2015. The first trip was for Mr. Tran's own wedding to Ms. Doan in January 2011.

[49] In the context of prior trips and the extensive family Mr. Tran had in Vietnam, it was reasonably open to the IAD to afford little weight to the trips. It did not err in that assessment.

(3) Money transfers

[50] Ms. Doan testified that Mr. Tran sent her \$40,000 CDN for treatments for conception and trips. The IAD found that there was not sufficient evidence to prove that \$40,000 was given to Ms. Doan. It also noted that Mr. Tran sends money to his family and that he asked Ms. Doan to give it to them. It said that even if there was such evidence it did not, in and of itself, suggest there was a genuine marriage.

[51] Mr. Tran submits that it was speculative of the IAD to find the money was meant for his family, not for Ms. Doan. The IAD did not speculate. The evidence in the record is that Mr. Tran testified that he sent \$5000 in January 2017 to his wife from which she was to keep \$2500 and give \$2500 to his parents. Mr. Tran testified that she did give his parents that money.

[52] The record contains evidence of some money transfers to Ms. Doan the total of which is much less than \$40,000 Cdn. The Minister observes that between 2011 and 2017, the sum of \$18,945 was transferred to Ms. Doan by Mr. Tran.

[53] By way of explanation, Mr. Tran testified that he had sent “about” \$17,000 Cdn to Ms. Doan by money transfer. When he was on a trip to Vietnam, he would take cash with him because he needs money when he is there and he also provided money for fertility treatments.

[54] Mr. Tran estimated he had given Ms. Doan an overall total of about \$30,000 in money transfers and cash over the period in question. Ms. Doan testified that she received \$40,000 in total from Mr. Tran. When that contradiction is coupled with Mr. Tran’s low monthly income of \$2,000 - \$2,500 and the fact that some of the money was to be given to Mr. Tran’s parents, it was not unreasonable for the IAD to conclude there was not sufficient evidence to support the claims of Ms. Doan with respect to the receipt of those funds.

C. *Did the IAD owe Mr. Tran and Ms. Doan an opportunity to respond to concerns?*

[55] Mr. Tran alleges that it was procedurally unfair for the IAD not to indicate during the hearing that it did not accept the evidence about the money.

[56] With respect to that argument, the onus was on Mr. Tran to document and substantiate his case. The evidence in the record, both documentary and oral, was considered by the IAD and it was found insufficient to prove that \$40,000 was given to Ms. Doan. Once again, the record supports the IAD’s finding.

[57] The conclusion is reasonable; it arises from the evidence. The weaknesses in the evidence could easily have been anticipated. The concerns of the IAD were not prompted by and did not arise from extrinsic evidence, as was the case in *Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284, which was highlighted by Mr. Tran. The concerns arose directly from the quality of the evidence and the desire of Mr. Tran and Ms. Doan that the IAD would have reached a different conclusion.

[58] The IAD did not consider the evidence piecemeal. It considered the evidence cumulatively and provided examples of the material problems that could not be overcome. The analysis and findings were reasonable given the state of the record.

VII. Conclusion

[59] Whether the marriage of Mr. Tran and Ms. Doan was genuine is a question of fact. This Court is required to show considerable deference to the IAD when determining whether the findings it made are justified, transparent and intelligible and whether they fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. It is not open to the Court to reassess the evidence that was considered by the IAD: *Sandhu* at para 21.

[60] The evidence before the IAD was found to be not credible, trustworthy or reliable enough to overcome the concerns of the IAD or those of the Visa Officer. Mr. Tran and Ms. Doan have urged the Court to come to a different conclusion.

[61] I am not persuaded that there is any reason to interfere with the outcome of the Decision.

[62] Mr. Tran described his answers as “simple”, rather than “vague”. The transcript shows however that his answers were frequently disjointed, incomplete and difficult or impossible to understand. Both counsel and the IAD had to frequently re-state and re-phrase questions in order to elicit an answer. This particularly was the case when each of Mr. Tran and Ms. Doan were questioned about the development of their relationship over time.

[63] The decision-making process of the IAD meets the *Dunsmuir* criteria. It displays the required hallmarks of justification, transparency and intelligibility. It resulted in a determination that the Court can see falls within the range of possible, acceptable outcomes which are defensible on the facts and law.

[64] For the above reasons, the application is denied.

[65] There is no question for certification on these facts.

JUDGMENT IN IMM-541-18

THIS COURT'S JUDGMENT is that the application is denied.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-541-18

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