Federal Court  Cour fédérale

Date: 20200128

Docket: IMM-1353-19

Citation: 2020 FC 152

Ottawa, Ontario, January 28, 2020

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

KIMBERLY WAQAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Kimberly Waqas, a Canadian citizen, sponsored her husband's application for a permanent residence visa. The application was refused and the refusal was upheld on appeal to the Immigration Appeal Division [IAD] of the Immigration and Refugee Board. The IAD accepted that the marriage was genuine but concluded that it had been entered into primarily for

the purpose of acquiring a status or privilege under the *Immigration and Refugee Protection Act*, SC 2001, c 27, [IRPA].

[2] The Applicant seeks judicial review of the IAD's decision pursuant to subsection 72(1) of the IRPA, submitting that the IAD's decision is not reasonable. For the reasons that follow, the Application is dismissed.

II. Background

[3] The Applicant was introduced to Mr. Muhammed Waqas via Facebook in 2012. At that time, the Applicant was 17, and Mr. Waqas was 25. The Applicant was estranged from her mother and living with her Aunt, Ms. Cherri Lee Abbas, who was married to Mr. Waqas' brother, Mr. Muhammed Abbas. The Applicant's Aunt, Ms. Abbas, made the Facebook introduction. The two then commenced an online relationship.

[4] In 2009, Mr. Waqas' brother, Muhammed Abbas, applied to sponsor Mr. Waqas into Canada on a family class sponsorship application that included his mother and younger brother. In January 2013, Mr. Abbas removed Mr. Waqas from the application.

[5] In March 2013, Mr. Waqas told the Applicant over Facebook that he wanted to live in Canada**.** In June 2013, the Applicant accepted Mr. Waqas' marriage proposal. That November she flew to Islamabad, Pakistan, where they met in person for the first time. While there, the Applicant converted to Islam, and in December 2013, the Applicant and Mr. Waqas married in a large Sunni Islamic wedding ceremony. The Applicant lived with Mr. Waqas in Pakistan until

March 2014, when she returned to Canada. The Applicant and Mr. Waqas now have two young children.

[6] In August 2014, the Applicant submitted an application to sponsor Mr. Waqas into Canada as a spouse. The application was denied, the visa officer not being satisfied that the Applicant intended to fulfil her sponsorship obligations, as required by paragraph 133(1)(b) of the *Immigration and Refugee Regulations*, SOR/2002-227 [Regulations] and concluding that Mr. Waqas was not the Applicant's "spouse" under subsection 4(1) of Regulations: that is, she was not satisfied that the marriage was both genuine and not entered into primarily for the purpose of acquiring permanent resident status in Canada.

III. The Decision under Review

[7] In confirming the visa officer's refusal, the IAD first noted that the Minister was no longer concerned that the Applicant did not intend to fulfil her sponsorship obligations and accepted that the marriage was genuine. This left a single issue for the IAD, whether the marriage was entered into primarily for the purpose of acquiring permanent resident status for Mr. Waqas in Canada.

[8] Subsection 4(1) of the Regulations provides that a foreign national shall not be considered a spouse where it is found that the marriage was entered into for the primary purpose of acquiring any status or privilege under the Act or the marriage is not genuine. The IAD cited *Gill v. Canada (Citizenship and Immigration)*, 2014 FC 902, where Justice James O'Reilly affirms at para 15 that the two section 4(1) factors are distinct but related: "the stronger the

evidence regarding the genuineness of the marriage (and where there is a child involved, this is strong evidence on its own), the less likely it is that it was entered into primarily to obtain an immigration advantage".

[9] The IAD reviewed five factors that led it to conclude the marriage was entered into with the primary purpose of acquiring permanent resident status for Mr. Waqas. The factors were (1) Mr. Waqas' immigration history, (2) the timing and initiation of the relationship, (3) Mr. Waqas' expressed interest in coming to Canada, (4) the couple's communications prior to the marriage, and (5) the factors pulling Mr. Waqas to Canada.

[10] The IAD noted that credibility formed an important part of the assessment in this case, as the documentary evidence was incapable of clearly deciding the outcome. The IAD found the Applicant to be credible, concluding that she was "young – 17 years of age, naïve and vulnerable" when she met Mr. Waqas and that she had legitimately entered the marriage. In considering Mr. Waqas' immigration history the IAD found the evidence from Mr. Waqas and his brother Mr. Abbas in respect of the inclusion and then removal of Mr.Waqas from the 2009 family sponsorship application to be inconsistent and not credible.

[11] Citing the credibility concerns relating to the circumstances surrounding the family class sponsorship, the IAD drew a negative inference from the Applicant's failure to have her Aunt, Ms. Abbas, testify. The IAD noted that Ms. Abbas had introduced the Applicant to Mr. Waqas, and that her evidence could have clarified whether the introduction was made to facilitate Mr. Waqas' ability to come to Canada. The IAD also noted that the importance of Ms. Abbas'

evidence had been brought to the attention of the Applicant in the course of the IAD appeal, which had unfolded over three separate dates, and that in expressing interest in Ms. Abbas' evidence the IAD had noted that it could be provided by way of a statutory declaration or affidavit.

[12] The IAD acknowledged that the circumstances of the case were difficult. However, the IAD the concluded, on balance of probabilities, that the marriage was entered into primarily for immigration purposes. Five years later, the marriage appeared genuine, but this was insufficient to remedy the exclusion of Mr. Waqas from the family class based on subsection 4(1) of the Regulations. The IAD dismissed the appeal.

IV. Issues

[13] I have framed the issues raised as follows:

A. Did the IAD err in drawing a negative inference from the fact that Ms. Abbas did not testify or provide affidavit evidence?

B. Did the IAD err in finding that Mr. Waqas was not considered a spouse pursuant to subsection 4(1) of the Regulations?

C. Did the IAD err in not considering the best interests of the children in its assessment of whether Mr. Waqas is the Applicant's spouse under subsection 4(1) of the Regulations?

V. Standard of Review

[14] This application was argued prior to the Supreme Court of Canada's decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. As a result of *Vavilov* the parties have provided further written submissions in respect of both the standard of the review and the Court's approach to the conduct of a reasonableness review. These submissions have been considered.

[15] The parties both take the position that all three issues are reviewable against the standard of reasonableness. The case law supports this (*Wong v. Canada (Citizenship and Immigration),* 2019 FC 1017 at para 13, *MacDonald v. Canada (Citizenship and Immigration),* 2012 FC 978 at paras 16 and 28, and *Singh v. Canada (Citizenship and Immigration),* 2016 FC 240 at para 13). The presumptive standard of reasonableness applies (*Vavilov* at para 16).

[16] In *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67 Justice Rowe summarizes the attributes of a reasonable decision:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will

> always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on . . . are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100). In this case, that burden lies with the Union.

VI. Analysis

A. *The IAD did not err in drawing a negative inference from Ms. Abbas' failure to provide evidence.*

[17] The Applicant submits that the IAD unreasonably attached too much weight to Ms. Abbas' role in establishing the purpose of the marriage as reflected in the IAD's characterization of Ms. Abbas as a matchmaker. She also submits that the IAD erred in relying on *Ma v. Canada (Citizenship and Immigration)*, 2010 FC 509 [*Ma*] and *Berhard v Canada*, 2004 FC 501 [*Berhard*] in drawing a negative inference. She distinguishes *Ma* on the basis that it was the Applicant, not a potential witness, who failed to testify in that matter. She distinguishes *Behard* on the basis that the issues there arose in a claim for damages under the *Canada Shipping Act, 2001*, SC 2001, c 26, a circumstance that is factually unique and distinct from the matter before the IAD.

[18] I am unpersuaded. In *Ma*, the IAD drew a negative inference from the fact that a spouse did not testify at the IAD hearing. However, *Ma* cannot be read as standing for the principle that a negative inference can only be drawn if an applicant or spouse does not testify. Justice Michel Shore states the following:

> [1] The principles of law on adverse inference are well-established. The leading statement is to be found in *Wigmore*, "Evidence in Trials at Common Law", 1979 (Chadbourn Rev.) at vol. 2, 285, page 192:
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> > … The failure to bring before the tribunal some circumstance, documents, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted. (Emphasis added).
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> [2] Reasonableness dictates that in the case of the Immigration and Refugee Board (and all its divisions), although the rules of evidence in its regard are relaxed, nevertheless, when evidence is available, or could be made available but not produced, or when a person can testify, is given the opportunity to testify, but does not testify, then an adverse inference can be drawn.
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> [3] The adverse inference is drawn not merely from the failure to produce, "but from non-production when it would be natural for the party to produce" such evidence: *Wigmore*, vol. 2 at 199; reference is also made to *Barnes v. Union Steamships Ltd.* (1954), 13 W.W.R. 72, aff'd, 14 W.W.R. 673 (B.C.C.A.), adopting and citing *Wigmore*:
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> > It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

[19] On the basis of these well-established principles Justice Shore concluded that "it would have been natural for the spouse to have testified at the appeal. It is clear that she, as the spouse, was particularly and uniquely qualified to give evidence on the material issue in the appeal" (para 6). *Ma*, however, is not restricted to circumstances where a spouse or applicant fails to testify. It is clear that a negative inference may be drawn from the failure to bring any witness who is given the opportunity to provide potentially dispositive testimony.

[20] In this instance, the IAD was concerned with Mr. Waqas' reasons for entering into the marriage. The IAD flagged the relevance of Ms. Abbas' evidence in the course of the hearing. When advised that Ms. Abbas could not testify in person, the IAD identified options to submit the evidence in writing.

[21] The IAD provided detailed reasons in support of the decision to draw the negative inference. The reasons provided are coherent and reflect a rational chain of analysis that has addressed both the relevant facts and the law (*Vavilov*, at para. 85).

B. *The IAD did not err in finding Mr. Waqas was not to be considered a spouse pursuant to subsection 4(1) of the Regulations*

[22] The applicant submits that in the face of undisputed evidence establishing the genuineness of the marriage, evidence that renders it is less likely the marriage was entered into with the primary purpose of acquiring an immigration advantage, the IAD unreasonably found the primary purpose of the marriage was to obtain an immigration advantage.

[23] It is submitted that Mr. Waqas' inclusion as a dependent applicant on his brother's 2009 application does not lead to the conclusion that he married the Applicant primarily to gain an immigration advantage and that there is nothing unreasonable with Mr. Waqas' desire to be reunited with his family in Canada. The removal of Mr. Waqas from the 2009 sponsorship application was explained and, in any event, Mr. Waqas' evidence was that he was not aware that he was included in the 2009 application, only learning of this in 2016. It is argued that the IAD engaged in conjecture when finding that Mr. Waqas' removal from the family class application was the genesis of his relationship with the Applicant and that the primary purpose in marrying the Applicant was to acquire status in Canada.

[24] I am satisfied that the IAD's conclusions were reasonable. The finding that a marriage is genuine is not determinative of its primary purpose (*Sandhu v Canada (Citizenship and Immigration)*, 2014 FC 834 at para 12). The IAD engaged in a detailed review of Mr. Waqas immigration history and the evidence both he and Mr. Abbas provided in respect of his inclusion in and removal from the 2009 family class application. The IAD set out and addressed in some detail the five circumstances that underpinned the IAD's conclusion that despite the marriage being genuine there was simply insufficient credible evidence to support a conclusion that the marriage was not entered into with the primary purpose of acquiring an immigration advantage. The identified circumstances were logically connected to the question before the IAD and the analysis undertaken reasonably linked the evidence to the conclusions reached (*Vavilov* at para 102).

[25] The IAD detailed its credibility concerns with the evidence of Mr. Waqas and Mr. Abbas. This included documentary evidence demonstrating that early in the relationship Mr. Waqas had expressed a wish to live in Canada but provided contradictory oral evidence on this point during the hearing. While the applicant understandably takes issue with the reasonableness of the IAD's findings, this disagreement does not render the decision unreasonable.

[26] Having carefully reviewed the IAD's reasons, I am satisfied that the IAD has engaged with the evidence and provided detailed reasons that respond to the issues that were before it and detail the reasoning supporting the conclusions reached. The reasons are transparent, justified and intelligible and the outcomes falls within the range of possible outcomes (*Vavilov* at para 86).

C. *The IAD did not err by failing to consider the best interests of the children*

[27] The IAD appeal was brought pursuant to subsection 63(1) of the IRPA. Subsection 63(1) provides that a person who has sponsored a foreign national as a member of the family class may appeal a decision not to issue a permanent resident visa, to the IAD. Section 65 of the IRPA then states:

Humanitarian and compassionate considerations	**Motifs d'ordre humanitaires**
65 In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations	**65** Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été

unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.	statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire.
[Emphasis added.]	[Non souligné dans l'original.]

[28] Having concluded that Mr. Waqas was not a spouse for the purposes of subsection 4(1) of the Regulations, the IAD was not in a position to consider humanitarian and compassionate factors – including the best interests of the children. It therefore did not err in failing to address the best interests of the children.

VII. Conclusion

[29] The application is dismissed. The parties have not identified a serious question of general importance for certification and none arises.

JUDGMENT IN IMM-1353-19

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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