Federal Court  Cour fédérale

Date: 20210712

Docket: IMM-1935-20

Citation: 2021 FC 731

Ottawa, Ontario, July 12, 2021

PRESENT: Mr. Justice McHaffie

BETWEEN:

SHAMSHER ALI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Shamsher Ali's sponsorship of his wife, Sidra Shamsher Ali [Ms. Ali], and their children was refused by a visa officer on grounds of misrepresentation. The Immigration Appeal Division (IAD) upheld this refusal, finding it did not have credible and trustworthy evidence from Pakistan that Mr. Ali's first wife, Sumera Shamsher [Ms. Shamsher], is deceased, and that there were concerns with the authenticity of the Nikah Nama for the second marriage. Ms. Ali was

therefore found inadmissible to Canada for misrepresentation, an inadmissibility that continues for a five-year period.

[2] I conclude the IAD's decision was unreasonable. It was incumbent on the IAD to consider all the relevant evidence before concluding that it "does not know what to believe" about Ms. Shamsher's death. This evidence included testimony from Mr. Ali and Ms. Shamsher's son regarding his mother's death. The IAD did not refer to or apparently consider this material testimony, which was directly relevant to the fact of Ms. Shamsher's death, and thus to the authenticity of documents that purport to confirm that death. This failure to account for significant material evidence on an issue central to the misrepresentation finding is unreasonable. The IAD's conclusion on the Nikah Nama documents was also unreasonable, as it ignored material evidence and made adverse findings about Mr. Ali's credibility without adequate justification.

[3] These issues render the decision as a whole unreasonable and are therefore determinative of this application for judicial review. The application is therefore allowed and the sponsorship application is remitted for redetermination by a different panel of the IAD. While Mr. Ali asked that I make declarations regarding certain facts and order the Minister to grant the sponsorship application, I conclude this is not an appropriate case to do so.

II. Issue and Standard of Review

[4] Mr. Ali raises one issue on this application, namely:

Was the IAD's decision unreasonable in light of the evidence before it?

[5] The IAD's decision is reviewable on the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Wang v Canada (Citizenship and Immigration)*, 2018 FC 368 at para 12. A reasonable decision is transparent, intelligible, justified in relation to the facts and law, based on an internally coherent and rational chain of analysis, and responsive to the submissions of the parties: *Vavilov* at paras 15, 85, 95, 127–128.

[6] In conducting reasonableness review, the Court must refrain from reweighing and reassessing the evidence and will only interfere with factual findings in exceptional circumstances: *Vavilov* at para 125. However, the Court must ensure that an administrative decision is justified in light of the facts and that the decision is reasonable in light of the evidentiary record and the general factual matrix that bears on it: *Vavilov* at para 126.

III. Analysis

A. *The problem before the IAD*

(1) The family context

[7] Mr. Ali married Ms. Shamsher in July 1991. The couple had two children, born in 1993 and 1995. While visiting Canada in 2004, Mr. Ali made a claim for refugee protection. Ms. Shamsher and their two children remained in Pakistan. Mr. Ali's refugee claim was accepted in September 2005. He obtained status as a permanent resident in September 2006 and is now a Canadian citizen.

[8] Mr. Ali states that Ms. Shamsher died suddenly on April 15, 2006. His mother arranged for his marriage to Sidra Latif (now Sidra Shamsher Ali), who he married in Pakistan in January 2007. The couple has three children, born in 2007, 2011, and 2019.

[9] The Minister has conceded the Alis are in a good faith relationship in the sense of being a genuine partnership not entered into for the primary purpose of acquiring status under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]: see *Immigration and Refugee Protection Rules*, SOR/2002-227 [*IRPR*], s 4(1). Rather, Mr. Ali's applications to sponsor Ms. Ali and their children have been refused based on concerns that Ms. Shamsher was alive when the Alis say they got married, and that documents the Alis filed to prove Ms. Shamsher's death and their subsequent marriage were not authentic. If Mr. Ali was still married to Ms. Shamsher when the Alis wed, then Ms. Ali would not be considered a member of the family class by operation of subparagraph 117(9)(*c*)(i) of the *IRPR*. The filing of inauthentic documents may amount to a material misrepresentation, resulting in an inadmissibility to Canada for a period of five years: *IRPA*, ss 40(1)(*a*), 40(2)(*a*).

[10] During the course of two sponsorship applications, the Alis filed a number of documents regarding their marriage and Ms. Shamsher's death. These include several death certificates and marriage certificates said to have been issued by Pakistan's National Database and Registration Authority (NADRA), and two versions of a Nikah Nama (an original marriage certificate completed by the Nikah Registrar), each in the original Urdu and with translations [Ward 54 Nikah Nama and Ward 79 Nikah Nama]. Given my conclusion that the matter should be returned for redetermination by the IAD, and the reasons for that conclusion, I will not address in detail

the various authenticity concerns that were identified with these documents. However, an overview of the procedural history and the documents is necessary to situate the IAD's decision.

(2) The First Sponsorship Application

[11] In July 2009, Mr. Ali applied to sponsor Ms. Ali and their first child, as well as the two children from his first marriage. Shortly thereafter, this application was refiled as two separate applications, one for the two children of the first marriage and one for Ms. Ali and the child of the second marriage. The former application apparently remains undetermined. The latter I will refer to as the First Sponsorship Application. It took a number of years to process and was refused in March 2013.

[12] During processing of the First Sponsorship Application, concerns were identified about documents the Alis had filed to prove their marriage and Ms. Shamsher's death. This included concerns arising from a 2012 investigation by an Anti-Fraud Unit (AFU) of Immigration, Refugees and Citizenship Canada (IRCC) referred to in the notes found in IRCC's Global Case Management System (GCMS). The 2012 investigation found that a document purporting to be an English translation of a death certificate from Union Council No 48 [UC48 Death Certificate] did not accord with information received from that Union Council. An officer also sent a copy of the Ward 79 Nikah Nama to Union Council 54, which apparently annotated the document indicating there was no record of the marriage (there is no translation of the annotation other than the officer's statement to this effect in the GCMS notes). The Alis did not respond to a procedural fairness letter (PFL) raising these concerns.

[13] The First Sponsorship Application was refused on grounds that (i) there was insufficient credible evidence of the marriage; (ii) even if they were married, Ms. Ali would be excluded from the family class by operation of subparagraph 117(9)(*c*)(i) of the *IRPR* since Mr. Ali was the spouse of another person at the date of the marriage; (iii) Ms. Ali was inadmissible under paragraph 41(*a*) of the *IRPA* for failing to comply with the *IRPA*; and (iv) Ms. Ali was inadmissible under paragraph 40(1)(*a*) of the *IRPA* for misrepresentation. At the time, paragraph 40(2)(*a*) of the *IRPA* provided that a foreign national remained inadmissible for misrepresentation for a period of two years following a final determination of inadmissibility. That period is now five years: *IRPA*, s 40(2)(*a*).

[14] Mr. Ali filed an appeal of the refusal of the First Sponsorship Application in 2013. However, at the outset of the hearing in November 2015, his counsel withdrew the appeal based on concerns about the likelihood of success, the unavailability of humanitarian and compassionate (H&C) relief in light of section 65 of the *IRPA*, and the intervening expiry of the two-year inadmissibility period.

(3) The Second Sponsorship Application

[15] In June 2016, Mr. Ali again sponsored an application for permanent residence by Ms. Ali and their two children, which I will term the Second Sponsorship Application.

[16] In support of the Second Sponsorship Application, the Alis filed new documents to prove Ms. Shamsher's death and their marriage. This included a NADRA Death Certificate issued in May 2013 from Union Council 48 [2013 NADRA Death Certificate], a document from the

Metropolitan Corporation of Lahore Health Department regarding Ms. Shamsher's death and burial [Health Department Document], and a NADRA Marriage Registration Certificate issued in February 2016 by Union Council 54 [2016 NADRA Marriage Certificate]. They also filed a copy of the Ward 54 Nikah Nama that had previously been filed, although not a copy of the Ward 79 Nikah Nama.

[17] A PFL was sent in January 2018 raising concerns about the genuineness of the marriage, the parentage of the children, and the authenticity of a number of the new documents as well as the Ward 54 Nikah Nama. The Alis filed DNA testing showing they were the biological parents of the two children but did not address the authenticity of the evidence of the death and second marriage.

[18] A second PFL was sent on May 30, 2018 reiterating the authenticity concerns. This letter also referred to a verification by IRCC's Risk Assessment Unit (RAU) in Islamabad, which found the 2013 NADRA Death Certificate was "improperly issued," the Health Department Document was "counterfeit," and information in the Health Department Document regarding Ms. Shamsher's burial was "false." No information or details regarding this verification or the basis for these conclusions is set out in either the PFL or the GCMS notes underlying it. The second PFL also suggested the 2016 NADRA Marriage Certificate was fraudulent based on the 2012 AFU investigation that had resulted in the first misrepresentation finding in 2013.

[19] The Alis, through their counsel, submitted further documents in response to the second PFL. This included (i) another NADRA Marriage Registration Certificate issued on

August 2, 2018 [2018 NADRA Marriage Certificate]; (ii) a copy of the 2013 NADRA Death Certificate said to have been confirmed by Union Council 157; and (iii) a further copy of the Ward 54 Nikah Nama, said to have been recently confirmed by Union Council 188 (the evidence shows that Union Councils in Lahore were renumbered). The 2018 NADRA Marriage Certificate bears a QR code and a note that "This Certificate can be verified at https://crms.nadra.gov.pk/verify."

[20] The Second Sponsorship Application was refused by letter dated April 5, 2019. The refusal letter concluded Ms. Ali was inadmissible for having misrepresented "[t]he evidence submitted with regards to the death of your sponsor's first spouse and the evidence submitted to support the validity of your marriage to the sponsor." This finding was based on the 2012 AFU investigation, and on the same information from the RAU that the 2013 NADRA Death Certificate was "improperly issued," the Health Department Document was "counterfeit," and the information about the burial in the Health Department Document was "false." The refusal letter also stated that the immigration officer was not satisfied Ms. Ali was a member of the family class, both because of the authenticity concerns about the Nikah Nama and Marriage Certificates, and by operation of subparagraph 117(9)(*c*)(i) of the *IRPR* since the evidence of Ms. Shamsher's death was deemed fraudulent.

[21] Mr. Ali appealed this finding to the IAD. On the appeal, Mr. Ali filed a number of further documents. These included (i) a further copy of the 2011 NADRA Death Certificate, apparently reissued with a QR code and an annotation that it had been checked by the Assistant Chief of Protocol in January 2020 and countersigned by the Ministry of Foreign Affairs; (ii) country

condition evidence regarding civil status documents in Pakistan and their adoption of a digital QR code system in 2019; and (iii) letters counsel sent in December 2019 to Union Councils 54/188 and 157 asking for confirmations and explanations regarding the documents and the IRCC's findings. The Minister also filed documents on the appeal, including the UC48 Death Certificate and the Ward 79 Nikah Nama, each of which the Alis had filed on the First Sponsorship Application but not the Second Sponsorship Application.

[22] At the IAD hearing, the Alis each gave evidence, as did Mr. Ali's son from his first marriage and Ms. Ali's cousin. Mr. Ali's son gave evidence that his mother had high blood pressure, and that he was at home on April 15, 2006 when she became ill. A child of 13 at the time, he got neighbours to take her to the hospital, where she died soon after. He testified that he attended his mother's funeral and burial, which was arranged by the cousin. The cousin testified he was also at the funeral and burial, obtained the Health Department Document at the graveyard, and later obtained the 2013 NADRA Death Certificate for Mr. Ali.

B. *The IAD's decision*

[23] The IAD confirmed the immigration officer's conclusion there was a misrepresentation and dismissed Mr. Ali's appeal. The IAD upheld the misrepresentation finding with respect to both the documents filed to prove Ms. Shamsher's death and those filed to prove the Alis' marriage.

(1) Documents evidencing Ms. Shamsher's death

[24] The IAD reviewed Mr. Ali's evidence regarding the death of his wife and the death certificates provided. It found Mr. Ali's explanation for not advising immigration officials at the time of her death—that he had not sponsored her by the time she died—made "little sense." The IAD drew an adverse inference as a result. The IAD also referred to immigration officer's notes that the RAU found the 2013 NADRA Death Certificate was "improperly issued," the Health Department Document was "counterfeit," and the information about the burial in the Health Department Document was "false." After reviewing Mr. Ali's evidence about the 2013 NADRA Death Certificate, the UC48 Death Certificate, and the 2011 NADRA Death Certificate, the IAD appears to accept the investigative findings that the Health Department Document was fraudulent, and that other death certificates were "determined to be fraudulent."

[25] The IAD concluded with respect to the question of Ms. Shamsher's death as follows:

> Quite frankly, the Panel does not know what to believe as it considers whether the appellant's first wife is deceased as stated. The appellant has not been able to provide sufficient credible and trustworthy documentation from Pakistan that would allay the immigration officer's concerns, as well as the Panel's concerns and therefore put to bed this critical issue. Therefore, the Panel has not been presented with credible and trustworthy evidence on appeal that the appellant's first wife is deceased and that he is properly married to the applicant.
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> [Emphasis added]

(2) Documents evidencing the Alis' marriage

[26] The IAD then considered the Nikah Nama documents. The IAD noted differences in the translations of the two documents, which had been put to Mr. Ali at the hearing. The IAD rejected as "far from credible" Mr. Ali's response that he did not know why the translations were different since they were done by the translators. The IAD therefore placed "little weight" on his testimony that the marriage was properly registered, and made a negative credibility finding. Given the concerns about the authenticity of the death certificates and the Nikah Nama, the IAD concluded there were reasonable grounds to believe there was a misrepresentation.

[27] The IAD went on to consider two other issues. First, the IAD rejected the Alis' request that the Second Sponsorship Application be converted to an application based on a conjugal or common-law relationship in accordance with *Tabesh v Canada (Citizenship and Immigration)*, 2004 CanLII 76104 (CA IRB). Second, the IAD concluded there were not sufficient humanitarian and compassionate (H&C) considerations to warrant relief.

C. *The IAD's decision is unreasonable in light of the evidentiary record and factual matrix*

[28] The IAD concluded the Alis misrepresented or withheld material facts in respect of the documents filed to prove Ms. Shamsher's death and those filed to prove the Alis' marriage. While these issues are factually interrelated, the misrepresentation finding with respect to either would be sufficient to ground the IAD's inadmissibility conclusion under paragraph 40(1)(*a*) of the *IRPA*. I will therefore address each finding in turn.

[29] I note at the outset of this discussion that the IAD did not make specific findings as to what it found to be the misrepresentations at issue. It referred to the "death certificate" as the primary basis for the immigration officer's refusal, without specifying which particular death certificate document or documents was the issue. As discussed below, the IAD also referred to the Health Department Document as having been determined to be fraudulent. However, it did not identify the documents or facts on which the misrepresentation finding was based. Rather, it generally concluded that Mr. Ali had not provided sufficient credible and trustworthy documentation to allay its concerns or to show Ms. Shamsher was dead and that he is properly married to Ms. Ali.

[30] As this Court has noted, a misrepresentation finding is a serious matter, with serious consequences: *Chughtai v Canada (Citizenship and Immigration)*, 2016 FC 416 at para 29. The Supreme Court has underscored that reasons for a decision "must reflect the stakes" to an affected individual: *Vavilov* at para 133. In my view, a party facing a finding of misrepresentation that entails a five-year inadmissibility period is entitled to know with greater specificity the fact or document found to be misrepresented or withheld: see, by analogy to applications to vacate refugee protection based on misrepresentation, *Canada (Minister of Citizenship and Immigration) v Wahab*, 2006 FC 1554 at para 29(c). This is of particular importance since some of the documents that were the subject of the first misrepresentation finding and were put into evidence by the Minister were not filed by the Alis in the Second Sponsorship Application and could not therefore be considered a further misrepresentation by them.

(1) Documents evidencing Ms. Shamsher's death

[31] I conclude that the IAD erred in failing to consider relevant evidence regarding Ms. Shamsher's death on April 15, 2006. As the IAD appears to have recognized, and as the Minister conceded in argument, whether Ms. Shamsher in fact died on April 15, 2006 is relevant to the question of whether the death certificate documents that state she died on that date are authentic. If Ms. Shamsher did die on April 15, 2006, this is not itself determinative that government documents confirming her death on that date are authentic. But it is a relevant fact that would tend to show they are authentic.

[32] In considering whether Ms. Shamsher was deceased, the IAD concluded it "does not know what to believe as it considers whether the appellant's first wife is deceased as stated." It reached this conclusion, or lack of conclusion, without considering highly relevant evidence on the issue. In particular, the IAD made no reference to the evidence of Mr. Ali and Ms. Shamsher's son, though he was an eyewitness to his mother's illness, her transport to the hospital, the report of her death, and her funeral and burial. Nor did the IAD refer to the cousin's evidence that he was present at the funeral and burial and obtained a number of the documents. The IAD also did not refer to the 2020 copy of the 2011 NADRA Death Certificate, with its additional indicia of credibility in the form of the QR code and further certifications, nor to the images and translation of Ms. Shamsher's tombstone.

[33] As the Minister points out, an administrative decision maker is not obliged to mention every piece of evidence or argument bearing on an issue: *Vavilov* at paras 125–128; *Lai v*

Canada (Minister of Citizenship and Immigration), 2005 FCA 125 at para 90. Nonetheless, the more important the unmentioned evidence is, the more willing the Court is to infer that the decision maker unreasonably failed to account for the evidence before it: *Cepeda-Guttierez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667, [1999] 1 FC 53 at paras 16–17; *Vavilov* at para 126. Here, the IAD did not refer to central corroborative evidence from eyewitnesses or to important documents going to a key factual issue, and provided no basis for not accepting that evidence. In my view, the IAD's findings about Ms. Shamsher's death, and in consequence its findings about the authenticity of the documents purporting to verify that death, were not adequately justified and failed to account for the evidence before it. They were therefore unreasonable: *Vavilov* at paras 86, 126.

[34] The foregoing is sufficient to address the IAD's misrepresentation conclusions with respect to the death certificate documents. However, I also have concerns with the IAD's unexplained reliance on conclusions regarding authenticity set out in the GCMS notes. Since receiving the second PFL in 2018, the Alis have been facing concerns about the 2013 NADRA Death Certificate having been "improperly issued," the Health Department Document being "counterfeit," and the information about the burial being "false." As Mr. Ali points out, these statements stem from an investigation by the RAU in 2018 that is described in the GCMS notes without any basis being given for the RAU's conclusions. There is no indication in the GCMS notes that even the immigration officers reviewing the Alis' file knew why these findings were made. Rather, the findings themselves are simply repeated in the GCMS notes, largely verbatim, as the matter was reviewed by different officers and IRCC offices.

[35] Despite having no explanation for the conclusion, and despite having additional evidence before it on a *de novo* appeal, the IAD appears to have accepted the findings of the RAU without explanation. The IAD referred to the results of the RAU investigation, and later responded to Mr. Ali's evidence that he had visited his first wife's grave and had been given the Health Department Document by stating that "[u]nfortunately, the document has been determined to be fraudulent" [emphasis added]. This assertion is made without analysis of why the document was found to be fraudulent, which is not stated in the GCMS notes or elsewhere in the record.

[36] Mr. Ali argues the IAD could not prefer unsworn GCMS notes to the sworn evidence of the Alis, relying on *Nazir v Canada (Citizenship and Immigration)*, 2010 FC 553 at para 14. *Nazir* is one of a number of cases in which this Court and the Federal Court of Appeal have held that where the contents of an immigration interview are at issue before the Court, particularly as it may relate to the fairness of the process, an immigration officer's notes cannot stand on their own as proof of their contents: *Wang v Canada (Minister of Employment and Immigration)*, [1991] 2 FC 165 (CA) at pp 168–170; *Chou v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 14890 at paras 4–14, aff'd 2001 FCA 299; *Nazir* at para 14; see also *Canada (Citizenship and Immigration) v Vujicic*, 2018 FC 116 at paras 12–18. The Court of Appeal similarly recently addressed the admissibility of GCMS notes under the "business records" and "principled" exceptions to the hearsay rule: *Cabral v Canada (Citizenship and Immigration)*, 2018 FCA 4 at paras 24–31.

[37] In each of these cases, however, the issue was the proof of facts before the Court, rather than before the IAD. The IAD, like other divisions of the Immigration and Refugee Board, is not

bound by legal or technical rules of evidence and may receive evidence "that it considers credible and trustworthy in the circumstances": *IRPA*, ss 170(*g*)–(*h*), 171(*a.2*)–(*a.3*), 173(*c*)–(*d*), 175(1)(*b*)–(*c*). This Court has recognized that an immigration officer may rely on notes of statements made by an applicant to another officer: *Ally v Canada (Citizenship and Immigration)*, 2008 FC 445 at para 20; *Hehar v Canada (Citizenship and Immigration)*, 2016 FC 1054 at paras 30–32; see also, by analogy, *4053893 Canada Inc v Canada (National Revenue)*, 2021 FC 218 at paras 27–32. This does not mean, though, that the IAD can treat a finding by an immigration officer as determinative of an issue before it.

[38] In the present case, the question of whether the documents were counterfeit or fraudulent, or whether the information in them was false, were matters for the IAD to decide on the evidence before it. The IAD could not simply adopt the RAU's findings on those issues, particularly without explanation. The IAD gave no indication why it considered the RAU's conclusions sufficiently reliable that they ought to be preferred to the evidence presented by the Alis. Indeed, the IAD had little basis on which to assess the RAU's conclusions at all, as neither the GCMS notes or any other evidence presented by the Minister stated why the "improperly issued," "counterfeit," and "false" conclusions were reached.

(2) Documents evidencing the Alis' marriage

[39] The IAD found there were "concerns with the authenticity" of the Alis' Nikah Nama. It therefore upheld the misrepresentation finding on this ground as well. In my view, this conclusion is also unreasonable, for two reasons.

[40] First, as with the documents evidencing the death of Ms. Shamsher, the IAD reached its finding without apparent consideration of relevant material evidence. In particular, the IAD did not refer to the 2018 NADRA Marriage Certificate or the recently attested copy of the Ward 54 Nikah Nama. The Alis put these documents forward as recently confirmed evidence of the information contained in the government registry systems. The 2018 NADRA Marriage Certificate shows essentially the same information as the 2016 NADRA Marriage Certificate, and provides additional indicia of credibility. The copy of the Ward 54 Nikah Nama indicates that Union Council 188 attested it as a copy of a document in their records, and Mr. Ali testified he obtained the attested copy directly from the Union Council.

[41] Again, if the 2018 NADRA Marriage Certificate and/or the Ward 54 Nikah Nama is available in the records of the Union Council, it does not necessarily mean the Ward 54 Nikah Nama is genuine. But these documents are material evidence that points to authenticity. They might, for example, have allowed the IAD to accept the Alis' submission that the statements recorded in the GCMS in 2012—that Union Council 54 had no record of the marriage—were an error arising from the "widespread problem" of inaccurate registration and the "catastrophic" control routines at Union Councils described in the country condition evidence. They are thus relevant to the question of whether the Alis made a misrepresentation by filing the Ward 54 Nikah Nama. Given the importance of this evidence, a lack of reference to it indicates the decision is not adequately justified and failed to account for the evidence: *Vavilov* at para 126; *Cepeda-Guttierez* at paras 16–17.

[42] Second, the IAD gave one primary reason for not accepting the Alis' evidence that they were married and that the Ward 54 Nikah Nama was genuine:

> The appellant was further directed to the translation of the Nikah Nama where there are noted differences in the translated documents in the Record [the Ward 54 Nikah Nama] and R-1 [the Ward 79 Nikah Nama] and asked to explain. His response was "I don't know. The person who translated it made it like that." The appellant's response is far from credible. Accordingly, little weight can be placed on his testimony that the marriage was properly registered. As such the Panel makes a negative credibility finding.
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> [Emphasis added; footnotes omitted.]

[43] The IAD's conclusion that Mr. Ali's response was "far from credible" comes without explanation. I recognize the importance of reading the IAD's decision in light of the record: *Vavilov* at paras 91–96. That record includes the transcript of the questions put to Mr. Ali, the documents and translations in question, and the evidence regarding Mr. Ali's limited education and English literacy. Even in light of the record, however, I am unable to understand why the IAD considered it "far from credible" that Mr. Ali did not know why the two translators made different translations of the two copies of a document. While the Court will not lightly interfere with a credibility finding, such findings must be reasonably and adequately explained: *Hassan v Canada (Citizenship and Immigration)*, 2010 FC 1136 at para 12; *Vila v Canada (Minister of Citizenship and Immigration)*, 2005 FC 415 at paras 5–9; *Hilo v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 228 (CA).

[44] Based on the failure to consider relevant material evidence and the lack of explanation for a central negative credibility finding, the IAD's misrepresentation finding regarding the Alis' Nikah Nama was unreasonable.

(3) The IAD set out the wrong standard for a finding of misrepresentation

[45] In addition to the foregoing issues, I have some concern that the IAD did not direct itself to the right question in respect of its misrepresentation findings. Following the adverse credibility finding regarding the Nikah Nama set out above, the IAD expressed its conclusions as follows:

> The evidence shows that not only are there concerns with the authenticity of the appellant's first wife's death certificate, the same applies to the appellant's and applicant's Nikah Nama. Therefore, the decision to refuse the applicants permanent resident visas is reasonable based on the evidence considered. The decision, in the Panel's view remains valid in law as there are reasonable grounds to believe that there was direct or indirect misrepresentation or withholding of material facts relating to a relevant matter that induces or could induce an error in the administration of the IRPA.
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> [Emphasis added.]

[46] The foregoing passage suggests the IAD considered it simply had to determine whether the visa officer's refusal decision was reasonable, and that a "reasonable grounds to believe" standard applied to the misrepresentation. Neither is correct. The IAD was conducting a hearing *de novo* that required it to determine whether the Alis had discharged their onus to show there had been no misrepresentations on a balance of probabilities: *Hehar* at para 35, quoting *Chughtai* at paras 29, 33; *Canada (Public Safety and Emergency Preparedness) v Amergo*, 2018 FC 996 at para 18. Notably, the "reasonable grounds to believe" standard set out in section 33 of the *IRPA* applies to inadmissibility under sections 34 to 37, but not inadmissibility for misrepresentation under section 40.

[47] The IAD set out at the beginning of its analysis the correct standard, noting that "the evidence must always be clear, convincing and cogent in order to satisfy the balance of probabilities test." In other circumstances, given the importance of reading the reasons holistically, this might allow a conclusion that the IAD simply misstated the standard in the foregoing paragraph, rather than applying the wrong standard in the analysis. However, combined with the IAD's failure to analyze relevant records, its unexplained reliance on conclusions in the GCMS notes, and its unexplained conclusion of credibility, I conclude that the IAD's reasons with respect to the death certificates and Nikah Nama do not show the requirements of transparency, justification, and intelligibility required for a reasonable decision: *Vavilov* at paras 15, 98–100.

[48] The IAD's decision regarding misrepresentation was unreasonable in respect of both the documents related to Ms. Shamsher's death and those related to the Alis' marriage. Since this conclusion is determinative of this application, I need not address the Alis' arguments regarding H&C considerations or the requested "*Tabesh* conversion."

D. *Remedy*

[49] Mr. Ali's application for judicial review requested that the IAD's decision be set aside and referred back for redetermination. In his further memorandum of argument, he sought additional orders: (i) a declaration that the evidence showed Ms. Shamsher is deceased; (ii) a declaration that the discrepancies in the documents regarding the Alis' marriage do not constitute misrepresentation; and (iii) an order requiring the Minister to grant the Second Sponsorship Application. However, other than the request for these orders, the further memorandum made no

submissions why they should be granted. At the hearing of this application, Mr. Ali's counsel made submissions on remedy, with reference to paragraphs 140 to 142 of the Supreme Court of Canada's decision in *Vavilov*. As those submissions became more detailed, I sustained the Minister's objection based on the lack of submissions in the further memorandum of argument. Mr. Ali's counsel requested an opportunity to file subsequent written submissions on the issue.

[50] For the following reasons, I refuse Mr. Ali's request for an opportunity to file further written submissions, and dismiss the request for the additional orders.

[51] First, I note the importance of parties putting forward their arguments in their written memoranda to provide the opposing party with notice and an opportunity to respond: *Coomaraswamy v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153 at para 39; *Dave v Canada (Minister of Citizenship and Immigration)*, 2005 FC 510 at para 5. While the Court has a discretion to request or permit subsequent written submissions, I am not satisfied I should exercise that discretion in these circumstances. Rule 15(1)(*c*) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 and this Court's orders granting leave to apply for judicial review provide for the filing of further memoranda after the certified tribunal record and other materials have been filed. This gives parties and counsel a generous opportunity to consider and raise all arguments considered relevant and material, even where the matter is complex.

[52] Second, the orders requested would constitute what is termed "indirect substitution," that is, a way for this Court to indirectly substitute its decision for that of a tribunal through a

declaration or direction: *Canada (Citizenship and Immigration) v Tennant*, 2019 FCA 206 at paras 69–75. As Mr. Ali recognizes, this will only be done in exceptional circumstances or "limited scenarios," such as where there is only one reasonable determination of the issue: *Tennant* at paras 69, 75, 79; *Vavilov* at paras 140–142.

[53] In the present case, there has been no "endless merry-go-round" of judicial reviews: *Vavilov* at para 142. While the Alis first filed a sponsorship application in 2009, that application was rejected and there is no outstanding challenge of that rejection. This is the first application for judicial review of the Alis' Second Sponsorship Application, which was filed in 2016, decided by the visa officer in April 2019 after two PFLs, and decided promptly by the IAD after a two-day hearing. While I understand the Alis' desire for a speedy outcome, and their hopes for the reunification of their family, I am not satisfied that the timing of the processing of this application, which Mr. Ali concedes is complex, suggests that the Court should impose or substitute its own decision, even if the Court were in a position to make its own assessments of credibility and genuineness in the circumstances.

[54] Nor is this a case where "a particular outcome is inevitable": *Vavilov* at para 142. While the IAD had a "genuine opportunity to weigh in on the issue in question," this alone cannot be sufficient to justify indirect substitution, or it would be available whenever a tribunal has erred in addressing a matter or failing to do so: *Vavilov* at para 142.

[55] I therefore conclude that the IAD's decision should be quashed, and Mr. Ali's appeal should be remitted to the IAD for redetermination by a differently constituted panel. The parties

and the IAD may wish to give consideration to whether, and to what extent, some or any of the testimony from the hearing already conducted may be adopted as evidence on the redetermination, such as that of Mr. Ali and Ms. Shamsher's son.

IV. Conclusion

[56] The application for judicial review is therefore allowed and Mr. Ali's appeal is remitted to the IAD for redetermination. Neither party proposed a question for certification. I agree that none arises in the matter.

JUDGMENT IN IMM-1935-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed and the applicant's appeal is remitted to the Immigration Appeal Division for redetermination by a differently constituted panel.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1935-20
STYLE OF CAUSE:	SHAMSHER ALI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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JUDGMENT AND REASONS:	MCHAFFIE J.
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