Federal Court  Cour fédérale

Date: 20210715

Docket: IMM-1589-20

Citation: 2021 FC 741

Ottawa, Ontario, July 15, 2021

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ARSHDEEP GILL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a 26 year-old Canadian Citizen who entered into an arranged marriage in India. His application to sponsor his spouse as a permanent resident in Canada was refused. The visa officer found the marriage was not genuine, or was entered into primarily for the purpose of acquiring permanent residence in Canada.

[2] The Applicant appealed the negative decision to the Immigration Appeal Division [IAD]. On appeal, an additional ground for the refusal was advanced, the Minister submitting to the IAD that the marriage did not satisfy the definition of marriage in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. The issue was whether the Applicant, who undisputedly suffers from significant mental disabilities, had the capacity to consent to the marriage.

[3] On February 5, 2020, the IAD found the Applicant lacked capacity to consent to the marriage and that capacity to consent is required for marriage to be valid under the laws of Canada and India. As such, the IAD concluded that the marriage was not legally valid. The IAD also found that, in light of all of the circumstances, the marriage was an arrangement entered into primarily for the purpose of immigration and for that reason was not genuine.

[4] The Applicant seeks judicial review of the IAD decision under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. For the reasons that follow, the Application is granted.

II. Background

A. *The Applicant's circumstances*

[5] The Applicant's disabilities are not in dispute. Although not exhibiting any serious health issues at birth, he suffered his first seizure at two years of age and his health condition then worsened after he reached five or six years of age. He completed grade 6 in a regular school

class and then attended special classes until grade 12. Since completing grade 12 he has attended, and continues to attend, a special program for those with disabilities.

[6] The Applicant is largely verbally nonresponsive, usually quite drowsy, has poor eye contact, and slowed motor control. He suffers from regular seizures and requires several medications daily. In expressing the view that the Applicant would be unable to testify before the IAD, his family doctor described his insight and judgment as being grossly impaired by his intellectual disability. The Alberta Court of Queen's Bench appointed his parents as guardians and trustees for all purposes in 2013.

[7] Despite the noted disabilities, the evidence indicates he can complete certain personal care tasks with assistance such as showering and dressing. He goes for supervised walks, plays video games, and bowls. His family reports that he is able to communicate with them—his mother speaks with him about daily activities and he responds in short sentences or monosyllables. She also reports he is able to communicate preferences for specific foods, and that he has communicated to her that he wants to have children. His uncle, who lives next door to the Applicant, reports a good relationship with the Applicant and that when the Applicant visits, they sit together to watch movies, play cards, and talk.

[8] The Applicant's mother and father sought to arrange a marriage for the Applicant in accordance with their traditional cultural practice. After a meeting between families, the Applicant entered into an arranged marriage in India. After the wedding and a honeymoon, the Applicant returned to Canada and sponsored his new wife's permanent residency application.

B. *The visa officer denied the permanent residency application*

[9] The visa officer identified a series of concerns in finding the marriage between the Applicant and his wife was not genuine, or entered into primarily for the purpose of acquiring permanent residence in Canada:

A. The Applicant and his wife were not compatible on age or education. The wife was four years older than the Applicant and had a master's degree, whereas the Applicant had only completed high school.

B. The Applicant and his wife were married only three weeks after their first meeting. The wife was unable to provide a credible explanation for such a hasty wedding with an incompatible partner.

C. The Applicant only stayed with the wife for four weeks after the marriage and did not visit afterwards. After he left India, communication between the two was limited to short, irregular phone calls.

D. Photographs submitted of the two did not depict a comfortable couple.

E. The wife had difficulty explaining the Applicant's medical issues, which the visa officer expected her to be able to do.

[10] Neither the Applicant's capacity nor the validity of the marriage were identified as issues before the visa officer. The Applicant appealed the visa officer's decision to the IAD.

III. Decision under Review

A. *Validity of the marriage as a ground of refusal*

[11] Before the IAD, Minister's counsel sought to add, as an additional ground for the refusal, that the marriage was not valid because the Applicant lacked the capacity to consent to the marriage.

[12] The IRPR define marriage as follows:

2 The definitions in this section apply in these Regulations.	2 Les définitions qui suivent s'appliquent au présent règlement.
[…]	[…]
marriage, in respect of a marriage that took place outside Canada, means a marriage that is valid both under the laws of the jurisdiction where it took place and under Canadian law. (*mariage*)	mariage S'agissant d'un mariage contracté à l'extérieur du Canada, mariage valide à la fois en vertu des lois du lieu où il a été contracté et des lois canadiennes. (*marriage*)

[13] A valid marriage pursuant to the regulations must be one that is valid under Canadian law and the law of the jurisdiction where the marriage took place.

[14] In seeking to add the validity of the marriage as a ground for refusal, Minister's counsel referenced section 5 of the *Hindu Marriage Act*, which governed the marriage in India. Section 5 of the *Hindu Marriage Act*, states the following:

5. Conditions for a Hindu Marriage

A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

[…]

ii) at the time of the marriage, neither party,—

a. is incapable of giving a valid consent of it in consequence of unsoundness of mind; or

b. though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extend as to be unfit for marriage and the procreation of children; or

c. has been subject to recurrent attacks of insanity or epilepsy;

[…]

[15] Minister's counsel specifically references paragraph 5(ii)(a) of the *Hindu Marriage Act* and advised the IAD that paragraph 5(ii)(c) of the Act had been repealed and would not be relied upon.

[16] The Applicant consented to the added ground of refusal. The IAD decision states that the IAD communicated that legal validity was added as an issue on appeal on July 10, 2019. This communication is not contained in the record.

B. *The IAD hearing*

[17] At the outset of the hearing, the IAD identified two issues, the legal validity of the marriage and whether the marriage was captured by subsection 4(1) of the IRPR as a marriage that was either not genuine or entered into primarily to acquire status or privilege under the

IRPA. At the conclusion of the hearing, the Applicant provided the IAD with written submissions arguing that the marriage was genuine and addressing the validity of the marriage under the *Hindu Marriage Act*. The Applicant's validity submissions relied on a legal opinion from a family law expert in India. The legal opinion concludes (1) that a person with diminished capacity can enter into a legally valid marriage; (2) that even in a situation where a party lacks capacity to consent, the marriage remains effective under the *Hindu Marriage Act* absent a challenge to its validity by a party—the marriage, while voidable, is not void *ab initio*; and (3) as neither party has challenged the validity of the marriage, it remains effective under the applicable Indian law.

[18] Although Minister's counsel identified the requirements of Indian law in raising the issue of validity, the Minister's written submissions focus on the validity of the marriage under Canadian law and more specifically whether the Applicant's diminished capacity allowed him to consent to marriage under Canadian law. The Respondent's submissions do not address the issue of validity under the *Hindu Marriage Act*, but conclude, after summarizing the evidence relating to the Applicant's capacity, that the marriage was not valid under either Canadian or Indian law.

[19] The Applicant took the position before the IAD that the Minister's written submissions challenging the validity of the marriage under Canadian law raised a new issue. The Applicant sought an extension of time to obtain an expert opinion on the validity of the marriage in Canada and to file reply submissions. The IAD refused the request to submit expert evidence on Canadian law but did provide the Applicant with an extension of time to file reply submissions.

The IAD held there had been a full and fair opportunity to present evidence and the validity of the marriage under Canadian law was an issue for the IAD, not an expert, to decide.

C. *The IAD denied the appeal*

[20] In denying the appeal, the IAD first addressed the Applicant's concern that the validity of the marriage under Canadian law was a new issue. The IAD found that the Applicant should not have been surprised by submissions addressing the validity of the marriage under Canadian law. In support of this finding the IAD noted that: (1) the Applicant appeared to accept the Minister's request that capacity to consent be determined by the IAD as an added ground of refusal; (2) the Applicant did not raise an objection when the IAD communicated its decision to add the issue of legal validity as a ground of appeal; and (3) no objection was raised when legal validity was identified as one of two issues at the outset of the hearing. Finally, the IAD found that any right to object was waived by the Applicant's full participation in the hearing, which included the presentation and testing of evidence relating to the Applicant's capacity.

[21] The IAD then considered the capacity evidence and concluded the Applicant was unable to consent to the marriage under Canadian law. The IAD found that to have the capacity to consent, the Applicant was required to understand the duties and responsibilities that marriage creates: a legally monogamous relationship, indeterminable except by death or divorce, involving mutual support and cohabitation. The IAD concluded the evidence did not establish the Applicant had the capacity to understand these duties and responsibilities and therefore the marriage did not meet the requirements of Canadian law and is void *ab initio*. The IAD also

concluded that it was not evident, on a balance of probabilities, that the requirements of the *Hindu Marriage Act* were met.

[22] In considering the second issue, whether the marriage was genuine or was entered into primarily to acquire status, the IAD recognized an element of genuineness to the marriage. The IAD noted the Applicant's family believed the marriage was in the Applicant's best interests. However, the IAD found the primary purpose for entering into the marriage was to find a caregiver for the Applicant, noting that the "families agreed, in essence, that [the wife] would be a caregiver for [the Applicant] and each perceived some advantages in this arrangement." The IAD found the benefit to the wife was that her family did not have to pay a dowry. The IAD held the marriage was either not genuine or was entered into for the purpose of acquiring status.

IV. Issues and Standard of Review

[23] Two issues arise:

A. Did the Applicant know the case to meet?

B. Was the IAD's decision on the merits reasonable?

[24] Whether the Applicant knew the case to meet raises a fairness question. Procedural fairness issues are reviewed by asking whether a fair and just process was followed, having regard to all of the circumstances: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CPR*]. This review is "best reflected in the correctness standard," although no standard of review is actually being applied (*CPR* at para 54). Where the case to meet is the issue, the true question before the Court is "whether, taking into account the

particular context and circumstances at issue, the process followed by the decision-maker was fair and offered to the affected parties a right to be heard and the opportunity to know and respond to the case against them" (*Lv v Canada (Minister of Citizenship and Immigration)*, 2018 FC 935 at para 17 [*Lv*]).

[25] There is no reason to depart from the presumption of reasonableness review in considering the merits of the IAD's decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 33 and 53 [*Vavilov*]). The IAD's evaluation of the validity of the marriage and whether the marriage is captured by IRPR subsection 4(1) is reviewable on a reasonableness standard (see *Kusi v Canada (Minister of Citizenship and Immigration)*, 2021 FC 68 at para 6). A decision is reasonable where it is "based on an internally coherent and rational chain of analysis and…is justified in relation to the facts and law" (*Vavilov* at para 85).

V. Analysis

A. *The process was unfair*

[26] The Respondent asserts no breach of fairness arises in this instance. It is submitted that the validity of the marriage was clearly identified as an issue on appeal as was section 2 of the IRPR, which identifies the requirement for a foreign marriage to be valid in both the foreign jurisdiction and in Canada. The Respondent acknowledges that in seeking to add validity as a ground of appeal the issue was discussed in terms of the *Hindu Marriage Act*. However, the Respondent submits the Minister never indicated that the issue was limited to validity under foreign law. I am unpersuaded.

[27] It is uncontroversial that a fair hearing requires the affected person know the case to be met and that person be given a meaningful opportunity to respond (*Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 at para 53). The required specificity of the notice provided an affected person is to be determined in light of all of the circumstances including consideration of whether the affected person was in a position to meaningfully respond. Where an interested person is misinformed about the issues, including the statutory provisions in issue, a Court may conclude the interested person was unaware of the case to be met (*Therrien v Canada (Attorney General)*, 2017 FCA 14).

[28] Section 2 of the IRPR unquestionably requires that for a foreign marriage to be valid, it must be valid under the law, both of the foreign jurisdiction in which the marriage occurred and in Canada. The definition of a valid marriage allows validity to be challenged on different grounds. However, this possibility cannot serve as adequate notice in a circumstance where the issue is framed as specifically as it was in this instance—the validity of the marriage was being raised on the basis that it failed to comply with paragraph 5(ii)(a) of the *Hindu Marriage Act*. Minister's counsel further specifically advised that 5(ii)(c) of the *Hindu Marriage Act* would not be relied upon, and no reference is made to validity under Canadian law prior to receipt of Minister's counsel's post hearing written submission.

[29] In its decision, the IAD relies on the Applicant being given notice that validity was in issue. The IAD cites a July 10, 2019 communication notifying the parties that legal validity was an added issue on appeal. This communication is not in the record and it appears the Applicant is correct in submitting it was never sent.

[30] The IAD also relies on its issue identification statement at the outset of the hearing where validity is identified as one of the two issue to be addressed. However, in this general statement the IAD does not indicate that it will be considering the issue more broadly than was initially identified by Minister's counsel. Nor does the transcript of the hearing indicate that validity under Canadian law or pursuant paragraphs 5(ii)(b) or (c) of the *Hindu Marriage Act* arose in the course of the hearing.

[31] In the absence of any explicit or implicit notification that the issue of validity was broader than that initially identified by Minister's counsel, I am of the view that the IAD was incorrect in finding that the Applicant's full participation in the hearing without objection implicitly waived any right to raise procedural fairness concerns.

[32] Despite these circumstances, the Applicant was ultimately notified that the validity of the marriage under Canadian law was in issue through Minister's counsel's written submissions. In response, the Applicant sought, and the IAD granted, an extension of time to allow the Applicant to file reply submissions. I am not convinced that this extension of time to file reply submissions cured the deficient notice.

[33] An extension of time will often remedy a procedural fairness beach involving a lack of notice. However, that is only the case where "taking into account the particular context and circumstances at issue, the process followed by the decision-maker was fair and offered to the affected parties a right to be heard and the opportunity to know and respond to the case against them" (*Lv* at para 17).

[34] In this instance, the absence of notice was not limited to validity of the marriage under Canadian law. There was also a lack of notice as to what provisions of the *Hindu Marriage Act* were being relied upon. Before the IAD, Minister's counsel took the position that only paragraph 5(ii)(a) of the *Hindu Marriage Act* was in issue yet the IAD relied on section 5 as a whole, including a paragraph 5(ii)(c) which Minister's counsel advised the IAD had been repealed.

[35] The Applicant structured his case before the IAD on the basis that only validity under paragraph 5(ii)(a) of the *Hindu Marriage Act* was at issue. As the Applicant notes in his written submissions, this understanding was the basis upon which the Applicant consented to the addition of validity as a ground of refusal. It is also reasonable to conclude that the Applicant's understanding of the scope of the validity concern would have informed the Applicant's evidentiary decisions—which documentary evidence to file and which questions to ask when examining witnesses. The extension of time did not remedy the impact that the lack of notice had, or may have had, on these aspects of the Applicant's case. I am therefore unable to conclude with any confidence that the extension of time remedied the deficient notice or that the Applicant was offered a fair chance to respond to the case against him.

B. *Aspects of the IAD decision are unreasonable*

[36] My fairness finding is determinative. However, I am also of the opinion that two aspects of the IAD's analysis, while not determinative of this Application, are also unreasonable. I briefly canvas each of these in the event that my views may be of assistance in the reconsideration of this matter.

(1) *The IAD unreasonably found the marriage was entered into primarily for the purpose of immigration and is not genuine*

[37] The Applicant argues that the IAD's finding on this issue was not justified as no reasons have been provided. The Applicant relies on Justice Alan Diner's decision in *Patel v Canada (Minister of Citizenship and Immigration)*, 2020 FC 77 [*Patel*] in arguing that the lack of responsiveness to the evidence surrounding the circumstances of the marriage renders the decision unreasonable.

[38] The IAD addresses the marriage's purpose and genuineness in a single paragraph. While the brevity of the IAD's analysis does not render the finding unreasonable, the failure to provide responsive reasons that "meaningfully grapple with the key issues or central arguments raised" does *(Patel* at paras 15-17 citing *Vavilov* at para 127).

[39] The IAD relies on a perceived benefit to Mr. Gill's wife and her family in that a dowry was not required. How this fact either alone or in light of other facts and circumstances renders the marriage not genuine or one entered into for advantage in the immigration system is not addressed by the IAD.

[40] Similarly, the IAD finds that the primary goal of the marriage was to seek a caregiver for the Applicant. This conclusion is reached in the absence of any consideration of the evidence from the Applicant's mother to the effect that the marriage was pursued for two reasons: a desire that the Applicant have a wife and children of his own; and that the mother was hopeful, based on the experience of others, that the Applicant's condition might improve after marriage.

[41] While the IAD was not bound to accept the mother's evidence, the failure to respond to, grapple with it and point to the evidence it preferred undermines the responsiveness of the reasons.

(2) *The IAD unreasonably found that the marriage was invalid under Indian law*

[42] The Applicant submits the IAD's treatment of his expert evidence and reliance on paragraph 5(ii)(c) of the *Hindu Marriage Act* render the IAD's finding that the marriage was not a valid marriage in India, unreasonable. The Respondent argues that the IAD reasonably concluded the Applicant lacked the capacity to understand the nature of the obligations arising from marriage, a requirement under the *Hindu Marriage Act*. As such, the Respondent maintains the IAD reasonably found the marriage was not validly entered into in India.

[43] The expert opinion states that individuals with diminished capacity can enter into a legally valid marriage, but an individual must have a sufficient capacity to understand the nature of the obligations being assumed. The opinion further states that issues of capacity do not, under the applicable law, render a marriage void. Rather, where capacity is an issue, a marriage is voidable should a party to the marriage subsequently raise the matter. The expert concludes the marriage in this instance continues as an effective marriage in India.

[44] The IAD was not bound by the expert opinion; it was open to the IAD to come to a different conclusion. However, the reasonableness of the IAD's finding is again undermined by the failure to grapple with the expert evidence. For example, it is not evident upon a review of the reasons whether the IAD rejected the expert's opinion or whether the IAD was of the view

that, as the Respondent argued before this Court, the expert opinion was consistent with the IAD's finding. The reasons are lacking in transparency, intelligibility, and justification. The reasonableness of the finding is further undermined by the IAD's apparent reliance on a repealed paragraph of the *Hindu Marriage Act*.

VI. Conclusion

[45] The Application is granted. The parties have not identified a question of general importance for certification, and none arises.

JUDGMENT IN IMM-1589-20

THIS COURT'S JUDGMENT is that:

1. The Application is granted;

2. The matter is returned for redetermination by a different decision maker;

3. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1589-20
STYLE OF CAUSE:	ARSHDEEP GILL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	APRIL 7, 2021
JUDGMENT AND REASONS:	GLEESON J.
DATED:	JULY 15, 2021

APPEARANCES:

G. Michael Sherritt Navi Dhaliwal	FOR THE APPLICANT
Galina Bining	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sherritt Greene Barristers & Solicitors Calgary, Alberta	FOR THE APPLICANT
Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT