Federal Court  Cour fédérale

Date: 20211230

Docket: IMM-3642-20

Citation: 2021 FC 1356

Ottawa, Ontario, December 30, 2021

PRESENT: Mr. Justice Norris

BETWEEN:

SANIYE BOYACIOGLU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED JUDGMENT AND REASONS

I. OVERVIEW

[1] Saniye Boyacioglu, the applicant, is a citizen of Turkey. After arriving in Canada with her daughter, Ms. Boyacioglu sought refugee protection on the basis of her fear of her ex-husband. In October 2017, the Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada accepted the claim and granted Ms. Boyacioglu and her daughter refugee protection.

[2] In May 2018, Ms. Boyacioglu travelled to Iraq to marry Mohammed Salahaldeen, an Iraqi citizen who she had first met when she was living in Turkey.

[3] Ms. Boyacioglu eventually applied for permanent residence in Canada. She included Mr. Salahaldeen on her application as her spouse. He, in turn, applied for a permanent resident visa as a family member who had been included on her application.

[4] In a decision dated February 24, 2020, an Immigration Officer with Immigration, Refugees and Citizenship Canada ("IRCC") determined that Mr. Salahaldeen was not a member of the family class. Specifically, the Officer found that Mr. Salahaldeen had not established that his marriage to Ms. Boyacioglu was not entered into primarily for the purpose of acquiring a status or privilege under the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*") and that it was genuine. Both requirements must be met for a spouse to be included as family member under the regulations and be issued a permanent resident visa: see subsection 4(1), paragraph 1(3)(a), and section 176 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*").

[5] Ms. Boyacioglu now applies for judicial review of this decision under subsection 72(1) of the *IRPA*. She contends that the decision was not made in a procedurally fair way and that it is unreasonable. As I explain in the reasons that follow, I agree that the decision is unreasonable because the Officer failed to assess the evidence in light of a material consideration – namely, Ms. Boyacioglu's status as a Convention refugee. Since this is sufficient to warrant setting the

decision aside and remitting the matter for reconsideration, it is not necessary to address the procedural fairness issue.

II. PRELIMINARY ISSUE: THE ADMISSIBILITY OF THE APPLICANT'S AFFIDAVIT

[6] Ms. Boyacioglu filed an affidavit sworn on October 21, 2020, in support of her application for judicial review. In the affidavit, she reiterates some of the information that was before the Officer. However, she also provides a substantial amount of new evidence that was not before the decision maker, including additional details of her relationship with Mr. Salahaldeen, new information from Mr. Salahaldeen, responses to several of the concerns raised by the Officer in the decision, and a number of exhibits.

[7] While not raised as an issue by the respondent in its written argument, there is no question that the new evidence contained in the affidavit is inadmissible. Subject to certain exceptions that do not apply here, the general rule is that only material that was before the original decision maker may be considered on an application for judicial review. Consequently, generally speaking a party cannot submit new evidence: see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 17-20; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 13-28; and *Sharma v Canada (Attorney General)*, 2018 FCA 48 at paras 7-9.

[8] All of the new evidence in Ms. Boyacioglu's affidavit could and should have been placed before the decision maker. Admitting it at this stage would tend to "turn the Court's attention away from the decision under review and towards a *de novo* consideration of the merits" (*Henri*

v Canada (Attorney General), 2016 FCA 38 at para 41). That is not the role of the Court on judicial review. Thus, notwithstanding the lack of an objection from the respondent, I have not considered the new information or exhibits found in Ms. Boyacioglu's affidavit in assessing the reasonableness of the Officer's decision.

III. BACKGROUND

[9] Ms. Boyacioglu was born in Manisa, Turkey, in June 1979. Mr. Salahaldeen was born in Kirkuk, Iraq, in February 1991. The two first met in 2014, when Mr. Salahaldeen started to work at a restaurant in Istanbul, Turkey, where Ms. Boyacioglu was a manager.

[10] At the time, Ms. Boyacioglu was married. However, she initiated divorce proceedings in in August 2016. A court in Istanbul granted the divorce on May 9, 2017. Ms. Boyacioglu was given custody of the couple's then sixteen-year-old daughter and her ex-husband was granted visitation rights.

[11] Even before the divorce was granted, a romantic relationship had developed between Ms. Boyacioglu and Mr. Salahaldeen. Despite this, because of her fear of her ex-husband, Ms. Boyacioglu decided to leave Turkey for Canada, where her brother lives. Before doing so, in June 2017, she and Mr. Salahaldeen went to Iraq to announce their engagement to his family. They stayed there for six days. The two then returned to Turkey and visited for a few days with Ms. Boyacioglu's parents in Manisa.

[12] Ms. Boyacioglu and her daughter left Turkey for Canada on August 6, 2017, travelling on Canadian visitor's visas they had obtained a few months earlier.

[13] After arriving in Canada, Ms. Boyacioglu submitted a claim for refugee protection on her own behalf and on behalf of her daughter. The claim was based on her fear of her ex-husband, who she alleged was physically abusive and had threatened to denounce her to Turkish authorities as a member of the Gulen Movement. After a hearing, on October 2, 2017, the RPD determined that Ms. Boyacioglu and her daughter are Convention refugees.

[14] Ms. Boyacioglu and Mr. Salahaldeen (who was still living and working in Turkey) decided to get married in Iraq. Ms. Boyacioglu obtained a refugee travel document from the Canadian government that she used to travel to and from Iraq. The wedding took place in Kirkuk on May 9, 2018. Mr. Salahaldeen's family and friends attended the celebration. Ms. Boyacioglu's father was unable to travel due to illness so he and her mother remained at home in Turkey. A short time later, Ms. Boyacioglu returned to Canada. She eventually obtained permanent resident status in Canada.

[15] In May 2019, Mr. Salahaldeen submitted an application for a permanent resident visa, under subsection 176(2) of the *IRPR*, on the basis of his marriage to Ms. Boyacioglu. As part of the processing of the application, on January 30, 2020, Mr. Salahaldeen was interviewed by the Officer at the Canadian Embassy in Ankara, Turkey. Ms. Boyacioglu was not interviewed in connection with the application.

[16] Following the interview, at the request of IRCC, Ms. Boyacioglu submitted a copy of the divorce order granted by the Turkish court and a copy of her Turkish national identity card. IRCC had also asked for a copy of Ms. Boyacioglu's "Official Family Listing" from the Turkish General Directorate of Civil Registration and Nationality. Regarding the latter request, Ms. Boyacioglu responded to IRCC that she was unable to obtain this information. She explained:

> As a Protected Person from Turkey, I was not able to travel to the country to marry my husband. Instead we decided to marry in Iraq, where it was mutually safe for us. Due to this, I am unsure if my Marriage is recognized by Turkey or not. As a refugee from Turkey I am unable to provide the registration that was requested.

[17] IRCC did not request any additional information before a decision was made.

IV. DECISION UNDER REVIEW

[18] Subsection 176(1) of the *IRPR* provides that a protected person may include their family members on an application for permanent residency and paragraph 1(3)(a) sets out that such family members include the individual's spouse. Those family members are then able to make an application for a permanent resident visa in accordance with subsection 172(2). Further, subsection 4(1) of the *IRPR* provides as follows:

Bad faith	**Mauvaise foi**
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	**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

partnership or conjugal partnership	fait ou des partenaires conjugaux, selon le cas :
(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or	**a)** visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;
(b) is not genuine.	**b)** n'est pas authentique.
[…]	[…]

[19] As set out in the decision letter addressed to Mr. Salahaldeen dated February 24, 2020, the Officer concluded as follows:

> Based on the assessment of your information, including your application, the supporting documentation, and the information you provided during the interview, I am not satisfied that your marriage to your sponsor is genuine or that it was not entered into primarily for the purpose of acquiring permanent residence in Canada.

[20] The Officer goes on to explain that the refusal was based on several considerations which I would summarize as follows:

- Mr. Salahaldeen knew significant details about Ms. Boyacioglu's life but he did not know many details about her prior marriage. To the extent that he did know about her life, this could be explained by the fact that they had been friends for several years.

- Mr. Salahaldeen "did not know the details about her problems with her spouse" and his "statement regarding her fears from persecution in Turkey did not entirely match hers," which had important details he was unaware of.

- Neither Mr. Salahaldeen nor Ms. Boyacioglu had declared or registered the marriage in "official documents."

    - Mr. Salahaldeen did not declare the marriage in an application for a renewal of his Turkish residency in November 2019 and his Iraqi identity card still showed his marital status as "single".

    - Ms. Boyacioglu did not mention Mr. Salahaldeen in connection with her refugee claim in Canada even though they were already in a relationship when she submitted the claim. There was no evidence that Ms. Boyacioglu had registered the marriage in her "Turkish documents." And she had used a "temporary travel document" to travel to Iraq, "thus concealing her previous relationship and marital status in Turkey."

- There was little evidence of financial co-dependency. A joint bank account opened in April 2017 was active only for the period that Ms. Boyacioglu received unemployment benefits after she left work and moved to Canada.

- It was "unclear" why Mr. Salahaldeen and Ms. Boyacioglu "made no efforts to reside together in Istanbul" when Ms. Boyacioglu was still in Turkey after she had separated from her first husband.

- There was no evidence that any of Ms. Boyacioglu's family or friends were aware that she and Mr. Salahaldeen are married. None of her family or friends in Turkey attended the wedding. As well, there was no effort made to mark the marriage in Turkey "over a dinner or a small gathering with friends and family or people from your work place." As

a result, the Officer "was not satisfied that you two are regarded as a married couple by your immediate friends and families."

- There was no evidence that the two had spent any time together as a couple apart from the two weeks in Iraq in 2018 when they were married, demonstrating little commitment to the relationship.

[21] The Officer's Global Case Management System notes simply repeat the same points.

[22] Accordingly, since the Officer was not satisfied that Mr. Salahaldeen is considered a spouse under the regulations, the permanent resident visa application was refused.

V. STANDARD OF REVIEW

[23] The parties agree, as do I, that the substance of the Officer's decision is reviewed on a reasonableness standard.

[24] 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" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85). Among other things, an administrative decision maker "must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them" (*Vavilov* at para 126). Consequently, "the reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for

the evidence before it" (*ibid.*). When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances (*Vavilov* at para 125). At the same time, reasonableness review is not a rubber-stamping process; it remains a robust form of review (*Vavilov* at para 13).

[25] The burden is on the applicant to demonstrate that the Officer's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). See also *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at paras 12-13.

VI. ANALYSIS

[26] To repeat for ease of reference, subsection 4(1) of the *IRPR* provides as follows:

Bad faith	**Mauvaise foi**
4 (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership	**4 (1)** Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :
(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or	**a)** visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;

(b) is not genuine.	**b)** n'est pas authentique.
[…]	[…]

[27] This provision came into force on September 30, 2010 (SOR/2010-208, s 1). One material difference between it and the provision it replaced is that what had been a conjunctive test for disqualification from membership in the family class is now a disjunctive test. Previously, to disqualify a married applicant under the bad faith principle, a decision maker had to determine both that the marriage was not genuine and that it was entered into primarily for an immigration purpose. Now, either circumstance suffices to disqualify an applicant.

[28] This change was intended to make bad faith determinations more straightforward, with the expectation being that, in most cases, decision makers would focus on the primary purpose test: see the Regulatory Impact Analysis Statement re SOR/2010-208 (September 30, 2010), *Canada Gazette Part II, Vol 144, No 21*, pp 1942-46 ("Regulatory Impact Analysis"). It also entails, however, that it can be more difficult for a spouse to establish that their marriage is *bona fide*. This is because a married applicant must now demonstrate both that the marriage was not entered into primarily for an immigration purpose and that it is genuine to avoid disqualification under subsection 4(1) of the *IRPR*. Previously, it would have sufficed to demonstrate only one or the other of these things: see *Ferraro v Canada (Citizenship and Immigration)*, 2018 FC 22 at para 12 and *Idrizi v Canada (Citizenship and Immigration)*, 2019 FC 1187 at paras 25-27.

[29] Turning to the decision under review, I begin by noting that the Officer states that they were not satisfied that Mr. Salahaldeen's marriage to Ms. Boyacioglu "is genuine or that it was

not entered into primarily for the purpose of acquiring permanent residence in Canada" (emphasis added). This formulation tracks the language of subsection 4(1) of the *IRPR*. As a matter of logic, it denotes that Mr. Salahaldeen failed to discharge his burden to establish both that the marriage was genuine and that it was not entered into for an immigration purpose. The problem is that one can fail to meet a conjunctive test by failing to establish just one element of the test. Stating the conclusion as the Officer did leaves Mr. Salahaldeen and Ms. Boyacioglu (not to mention a reviewing Court) wondering: Was the application refused because the Officer was not satisfied that their marriage is genuine, because the Officer was not satisfied that it was not entered into primarily for the purpose of acquiring permanent residence in Canada for Mr. Salahaldeen, or both? While the two grounds for disqualification can be interconnected in a given case, they are distinct reasons for disqualifying a relationship that may be supported by distinct analyses and evidence: see *Singh v Canada (Citizenship and Immigration)*, [2015] 3 FCR 414, 2014 FC 1077 at para 20, *Ferraro* at para 13, and *Idrizi* at para 28; see also the Regulatory Impact Analysis at 1944.

[30] Since either reason would suffice to disqualify Mr. Salahaldeen under subsection 4(1) of the *IRPR*, strictly speaking, the Officer's disjunctive formulation cannot be faulted. The problem is that one cannot tell which ground (if not both) the Officer relied on in refusing the application. Nothing else in the decision sheds any light on this, leaving the Officer's determination ambiguous at best. Greater specificity about the ground (or grounds) on which the marriage was disqualified would have helped the individuals who are directly affected by the decision to understand better both what was decided and why: cf. *Vavilov* at para 95. It would also have

assisted the reviewing Court to understand better the reasoning process that led to the decision: cf. *Vavilov* at paras 84-85.

[31] That being said, it has not been suggested here that the Officer's formulation of the ultimate determination is itself a reviewable error. Rather, Ms. Boyacioglu contends that the Officer's assessment of the evidence that led to this conclusion is unreasonable in several respects.

[32] Whether a marriage is *bona fide* is a highly factual question. As observed in the Regulatory Impact Analysis, this determination can be exceedingly difficult to make in a given case as there will rarely be direct evidence of an improper purpose (at 1944). Decision makers tasked with making these difficult determinations are entitled to deference from reviewing courts. This is particularly the case when the decision maker has the benefit of having questioned the spouses in person: see *Kim v Canada (Citizenship and Immigration)*, 2016 FC 1141 at para 9; *Ma v Canada (Citizenship and Immigration)*, 2016 FC 1283 at para 7; *Pabla v Canada (Citizenship and Immigration)*, 2018 FC 1141 at paras 11-13; *Wong v Canada (Citizenship and Immigration)*, 2019 FC 1017 at para 13; and *Basanti v Canada (Citizenship and Immigration)*, 2019 FC 1068 at para 13.

[33] In my view, some of Ms. Boyacioglu's objections are simply disagreements with how the Officer weighed the evidence (e.g. the banking records). However, I am persuaded that the Officer's failure to consider the implications of Ms. Boyacioglu's status as a Convention refugee is a material omission that resulted in an unreasonable decision.

[34] The significance of this failure is evident in three considerations relied on by the Officer in determining that Ms. Boyacioglu and Mr. Salahaldeen had not established that their marriage is *bona fide*.

[35] First, the Officer draws an adverse inference from the fact that Ms. Boyacioglu travelled to Iraq for her wedding using a refugee travel document (what the Officer refers to as a "temporary travel document") and not her Turkish passport, "thus concealing her previous relationship and marital status in Turkey." In my view, it was unreasonable to draw this inference without at least considering the risks for Ms. Boyacioglu of using her Turkish passport to travel – most notably, the risk of subsequently facing an allegation that she had re-availed herself of the protection of Turkey and the potential loss of refugee protection under paragraph 108(1)(a) of the *IRPA*.

[36] Second, for the same reason, it was unreasonable for the Officer to draw an adverse inference from the fact that nothing had been done to mark the marriage in Turkey (where Ms. Boyacioglu's parents live and where she has friends) without considering the risks (both personal and legal) for Ms. Boyacioglu of returning to Turkey for this purpose or, alternatively, the pointlessness of such a celebration in her absence. (On a related note, the Officer is simply mistaken in stating that there was "no proof that anyone of [Ms. Boyacioglu's] family or friends is aware that you two are in a marital relationship." The record before the Officer included a letter from Ms. Boyacioglu's brother in Canada stating that he was aware of the marriage and, indeed, had assisted his sister in arranging her travel to Iraq for the wedding, among other things.)

[37] Third, it was unreasonable for the Officer to draw an adverse inference from the fact that the marriage had not been registered in Turkey without considering that, by having obtained refugee protection in Canada, Ms. Boyacioglu had effectively severed any connection with state authorities in Turkey and had started a new life in Canada before she remarried. She even reminded the Officer of this when she explained why she had not provided a Turkish registration of her wedding (which, of course, had taken place in another country): see paragraph 16, above. This was to no avail.

[38] In addition to failing to consider the implications of Ms. Boyacioglu's status as a Convention refugee, in my view the Officer also drew unreasonable inferences from the information Ms. Boyacioglu presented to support her claim for protection. For example, the Officer drew an adverse inference from the fact that Ms. Boyacioglu did not mention Mr. Salahaldeen in her refugee claim without having made any inquiries of her as to why this was the case. When the Officer asked Mr. Salahaldeen about this, he replied that he didn't know why Ms. Boyacioglu hadn't mentioned him and suggested that the Officer should ask her. For unknown reasons, the Officer did not make any further inquiries.

[39] Similarly, the Officer questioned the validity of Ms. Boyacioglu's relationship with Mr. Salahaldeen because his account of her fear of persecution in Turkey "did not entirely match hers" and he was "unaware of important details." The Officer simply presumed, in the absence of any basis in the record for doing so, that if their relationship was *bona fide*, Ms. Boyacioglu would have shared every detail of her refugee claim with Mr. Salahaldeen. In this respect, the decision lacks internal rationality: see *Vavilov* at para 104.

[40] These are not peripheral considerations or minor missteps in the decision. On the contrary, they go to the heart of the Officer's analysis of the very question in issue – whether the relationship is disqualified under subsection 4(1) of the *IRPR*. Ms. Boyacioglu's status as a Convention refugee from Turkey is a key element of the factual and legal constraints that bore on the decision. The Officer was clearly aware of this status yet assessed the evidence without regard to this material fact. The reasonableness of the adverse inferences the Officer draws are called into question when they are viewed in light of this status. These flaws in the Officer's analysis are sufficiently serious that the decision "cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[41] Before concluding, I should note that Ms. Boyacioglu also contends that the Officer unreasonably drew an adverse inference from the fact that she and Mr. Salahaldeen never lived together in Turkey, including during the time before they were married. While I am concerned that the Officer's approach did not exhibit the requisite degree of sensitivity to the personal values of Ms. Boyacioglu and Mr. Salahaldeen or to the prevailing social mores in their community in Turkey, this issue was not well-developed in the information put before the Officer. Since the flaws in the decision discussed above are sufficient to warrant setting the decision aside, it is not necessary to determine whether it is unreasonable on this additional basis. In any event, I trust that this issue will be developed more fully by Ms. Boyacioglu and Mr. Salahaldeen and considered more carefully by the next decision maker when the matter is reconsidered.

VII. CONCLUSION

[42] For these reasons, the application for judicial review is allowed. The decision of the Immigration Officer dated February 24, 2020, is set aside and the matter is remitted for reconsideration by a different decision maker.

[43] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

[44] Finally, Ms. Boyacioglu sought her costs on this application. Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, provides that no costs shall be awarded on an application for judicial review absent "special reasons." Ms. Boyacioglu has not demonstrated any special reasons warranting a costs award in her favour.

JUDGMENT IN IMM-3642-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Immigration Officer dated February 24, 2020, is set aside and the matter is remitted for redetermination by a different decision maker.
3. No question of general importance is stated.
4. No costs are ordered.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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