Federal Court  Cour fédérale

Date: 20250220

Docket: IMM-16184-23

Citation: 2025 FC 338

Ottawa, Ontario, February 20, 2025

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

ANGELA CROSBY ARTHUR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of a decision made by an officer with Immigration, Refugees and Citizenship Canada [IRCC] refusing the application of Angela Crosby Arthur [Applicant], seeking to be granted permanent residence under the Spouse or Common-Law Partner in Canada class.

Background

[2] The Applicant is a citizen of Ghana. While visiting her sister in Canada, the Applicant met George Taylor [Spouse or Sponsor]. They later married. Her Spouse sponsored the Applicant's application for permanent residence under the Spouse or Common-Law Partner in Canada class, which application was submitted in December 2020. In her application, the Applicant indicated that she had previously been married in Ghana to Samuel Crosby Arthur from February 21, 2015 to March 18, 2018. She also provided accompanying documentation in support of her application.

[3] By letter dated September 20, 2022, an IRCC officer [Officer] requested that the Applicant provide additional information by September 27, 2022. This included a divorce certificate and additional information from her Sponsor, as the Sponsor indicated "yes" to both questions on IMM 5533, part B, question 4. On September 27, 2022, counsel for the Applicant responded, provided additional documents and advised that the Applicant's Spouse/Sponsor was never previously married (but had previously been in a common-law relationship) and that the box should have been checked in the negative. It was the Applicant who had previously been married.

[4] On September 28, 2022, the Officer again wrote to the Applicant noting that the requested documents had not been received and again requested the same information. It would appear that the sending of this second request and the receipt of the response sent by the Applicant's counsel to the first request overlapped.

[5] By email dated May 9, 2023 [Procedural Fairness Letter], an officer advised the Applicant that, in order to finalize her application, specific documentation was required:

> The documentation currently on file to support the dissolution of your previous marriage to Samuel Crosby Arthur is insufficient as it only established that you have registered a divorce from this individual.
>
> Please provide a copy of the finalized divorce certificate between you and Samuel Crosby Arthur as well as documents confirming your custody of the two accompanying dependent children …..

[6] Counsel for the Applicant responded to the Procedural Fairness Letter on May 20, 2023. With respect to the Applicant's documentation concerning the dissolution of her previous marriage, counsel stated that the Applicant's marriage was dissolved in accordance with Ghana's customary law. That is, the requested divorce certificate was not available nor required under the laws of Ghana – specifically, the *Customary Marriage and Divorce (Registration) Law* (PNDCL 112) which was amended in 1991 by the *Customary Marriage and Divorce (Registration) (Amendment) Law* (PNDCL 263) – which provide for the registration of customary law marriages and divorces. Counsel attached a copy of the *Customary Marriage and Divorce (Registration) Law* (PNDCL 112) to the response. Counsel stated that the law provides for the registration of Customary Law divorces in Part II and section 6, in accordance with the Third Schedule. Once the registration is complete and has been entered by the Registrar, the entry serves as evidence of the dissolution of the marriage (Section 13).

[7] By letter dated December 6, 2023, the Officer refused the application.

Decision Under Review

[8] In the refusal letter, the Officer stated that it had been determined that the Applicant did not meet the requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRP Regulations*]. They then set out s 12(1) of the *IRPA* and ss 72(1), 124(a) and 125(1)(c)(i) of the *IRP Regulations*.

[9] The Officer noted that s 125(1)(c)(i) of the *IRP Regulations* states that, for the purposes of same, a foreign national shall not be considered a member of the Spouse or Common-Law Partner in Canada class by virtue of their relationship to the sponsor if (c) the foreign national is the sponsor's spouse and (i) the sponsor or the spouse was, at the time of their marriage, the spouse of another person.

[10] The Applicant had not satisfied the Officer that she was not a spouse of another person at the time of her marriage to the Sponsor. Accordingly, she did not meet the requirements of the Spouse or Common-Law Partner in Canada class. Her application was therefore refused.

[11] The Global Case Management System [GCMS] notes, which form part of the reasons for the decision, note that the application had provided a Dissolution of Customary Marriage, dated 2018/12/04, but that no “proof of Decree of Divorce” had been submitted. The notes state that a September 28, 2022 procedural fairness letter sought additional documentation. A response was received but, because the Applicant had provided only proof of registration of divorce for her

previous marriage, another procedural fairness letter was sent on May 9, 2023 requesting a "finalized Divorce Certificate". The Applicant's reply was that she does not have a finalized Divorce Certificate as it is not required under the laws of Ghana. The GCMS notes state that pursuant to IRCC operational procedures, in order to ascertain if there has been a divorce from a previous spouse in Ghana, proper documentation of the dissolution of a customary marriage is required. This is a decree, issued by a high court, circuit court, or district court stating that the marriage in question was dissolved in accordance with customary law. The GCMS notes state that the dissolution of the marriage appeared to be ongoing and, therefore, the Sponsor's marriage to the Applicant is currently considered null and void, pursuant to s 125(1)(c)(i) of the *IRP Regulations*. The Officer set out s 72(1) of the *IRPA*, ss 124 and 125(1) of the *IRP Regulations* and stated that, based on a balance of probabilities, they were "not satisfied that the Sponsor (*sic*) was not a spouse of another person at the time of his (*sic*) marriage to the applicant". As such, the Office stated that they were satisfied that the relationship is as described under s 125(1)(c)(i) of the *IRP Regulations*. Therefore, the Applicant would not be considered the spouse of the Sponsor and is not to be considered a member of the Spouse or Common-Law Partner in Canada class.

Issue and Standard of Review

[12] The Applicant identifies many issues, however, they boil down to the two points:

1. Was the Officer's decision reasonable?

2. Did the Officer breach the duty of procedural fairness in the circumstances of this matter?

[13] The parties submit and I agree that the standard of review on the merits of the Officer's decision is reasonableness. On judicial review the court "asks 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" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99).

[14] The standard of review for issues of procedural fairness is correctness (see *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35). Functionally, this requires the Court's analysis to focus on whether the procedure followed was fair, having regard to all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

The Decision Was Not Reasonable

Applicant's Position

[15] The Applicant submits that the law dealing with the registration of customary law marriages and divorces in Ghana is the *Customary Marriage and Divorce (Registration) Law*, 1985 (PNDCL 112). In particular:

> **PART II—REGISTRATION OF CUSTOMARY DIVORCE**
>
> **Section 6—Registration of Customary Divorce.**
>
> (1) The dissolution of any marriage registered under this Law shall be recorded by the Registrar of the District in the register of divorces (referred to in this Law as the "register") which shall be in the form set out in the Third Schedule to this Law.

(2) The provisions of subsection (1) of this section shall not apply to any marriage dissolved under section 41 of the Matrimonial Causes Act, 1971 (Act 367).

PART III—MISCELLANEOUS

Section 9—Certified Copies of Entries in Register.

Upon the registration of any marriage or the dissolution of any marriage the Registrar shall issue to the parties concerned a certified true copy of the entry in the register upon payment of a registration fee prescribed under this Law.

Section 13—Certified True Copies of Entries Admissible as Evidence.

In any proceedings a true copy of the entry in the register certified under the hand of the Registrar shall be admissible in evidence as sufficient proof of the registration of the marriage or the dissolution of the marriage.

[16] The Applicant relies on the decision of the Immigration Appeal Division [IAD] in *Eduful v Canada (Citizenship and Immigration)*, 2011 CanLII 66765 (CA IRB), in which the IAD found, among other things, that the registration of a marriage in Ghana creates a presumption that a marriage has met the requirements of formal validity and that formal validity is such cases must be determined based on the laws of the jurisdiction where the marriage occurred. The Applicant relies on this case to submit that the Officer in the present instance erred in finding that the duly registered dissolution of a customary marriage is not valid.

[17] Further, that registration under the *Customary Marriage and Divorce (Registration) Law* (PNDCL 112) as demonstrated by the certified copy of the Notice of Registration of Customary Marriage or Dissolution of Customary Marriage registration [Dissolution Registration] submitted

by the Applicant is *prima facie* evidence of the dissolution of the Applicant's prior marriage. More is not needed. The fact that IRCC's operational procedure prefers a court order confirming the dissolution of the marriage does not render the dissolution of the marriage invalid. The validity of the dissolution of the customary law marriages in Ghana is determined by the law of Ghana, not IRCC operational procedures.

Respondent's Position

[18] The Respondent submits that the Officer did not find that the Applicant's documents were invalid. Rather, that her evidence was insufficient to establish that she was not married to her former spouse at the time of her marriage to her Sponsor as she had not provided a certificate of divorce, which the operational manual instructed was the proper documentation of divorce. Given that the Applicant merely stated that a certificate of divorce was not required in Ghana, with no further support, it was open to the Officer to refuse the application. She failed to meet her onus of providing sufficient information to justify a positive decision.

Analysis

[19] As a starting point I note that the GCMS notes indicate that the Officer's refusal is based on the fact that the Applicant did not produce a "Decree of Divorce" of her prior marriage, which the Officer indicates is required pursuant to the IRCC operational procedures, and instead only produced "proof of registration of divorce." The Officer's justification for why a "Decree of Divorce" is required, as opposed to proof of registration, is based entirely on their reading and application of an unspecified provision of the "IRCC operational procedures". However, the

relevant operational procedures are absent from both the Application Record and the certified tribunal record. Neither party placed them, or a link to them, before this Court. In response to this concern, which I raised at the opening of the hearing, Respondent's counsel advised that they would produce a website reference after the hearing's conclusion.

[20] Counsel subsequently provided a copy of, and link to, Immigration, Refugees and Citizenship Canada's Operational Procedures [OP2] and advised that the relevant provision is OP2 s 5.33. That provision states as follows:

> **OP 2 Processing Members of the Family Class**
>
> **5.33. Legality of foreign divorces**
>
> Visa officers may need to look closely at foreign divorces to determine if sponsors or applicants were, or are, legally free to marry again. The fact that a marriage licence was issued, or that a couple has remarried, is not proof that a divorce was legal where it occurred, or that it would be recognized as legally valid in Canada.
>
> A foreign divorce is without effect if it was obtained by fraud or by denial of natural justice.
>
> The federal *Divorce Act* of 1985 governs the recognition of foreign divorces. It specifically provides for the recognition of foreign divorces where the divorce was granted after February 13, 1986. These divorces are valid in Canada if either spouse was ordinarily resident in the foreign jurisdiction for one year immediately preceding the application for the divorce.
>
> The *Divorce Act* also preserves common-law rules respecting recognition of foreign divorces. For example, Canadian courts may recognize foreign divorces when:
>
> - they are issued from a court in a country where neither spouse was ordinarily resident, but where the decree is recognized by the law of that country (other than Canada) where one or both were ordinarily resident at the time of the divorce. For example, a party living in California obtains

> a divorce in Nevada. If California recognizes the Nevada divorce, it is valid in Canada.
>
> - either party can show that they had a "real and substantial connection" with the foreign jurisdiction at the time of the divorce. Factors that might indicate whether there was a real and substantial connection would be whether an individual was born in that country, had family there, and regularly travelled there to spend time in the jurisdiction. This could be strengthened further if the individual owned property or conducted business in the jurisdiction. These factors are relevant because they indicate whether the court in that other country had the proper jurisdiction to hear the divorce when neither of the parties was ordinarily residing there for a year preceding the divorce action. If the real and substantial connection is made, and that party obtains a legal divorce in that country, it is valid in Canada.
>
> It is also possible that a divorce, issued by a court in a country where neither spouse was ordinarily resident but that is recognized by a second country (other than Canada) where one or both can show that they had a real and substantial connection to that second country at the time of the divorce, would be valid in Canada. For example, a party now ordinarily resident in Canada obtains a divorce in Nevada but was born in California, still has family there, and regularly travels there to spend significant amounts of time, maintaining a cottage that they inherited. If California legally recognizes the Nevada divorce, it may be valid in Canada, although it may be necessary to seek legal advice from NHQ.
>
> See the table below for examples.

[21] It is well established that operational instructions, procedures or guidelines are not legally binding. However, they may assist decision-makers in exercising their discretion and may

assist courts in assessing the reasonableness of an officer's decision (see, for example, *Raouf v Canada (Citizenship and Immigration)*, 2024 FC 1726 at para 26).

[22] The Respondent submits that, because the Applicant stated in her Procedural Fairness Letter response that a certificate of divorce was not required in Ghana, "with no further support", it was open to the Officer to refuse her application.

[23] However, the Applicant did include further support. In response to the May 9, 2023 Procedural Fairness Letter, her counsel explained that the Applicant's divorce was dissolved in accordance with customary law and that a divorce certificate as requested by the Officer was not available or required under the laws of Ghana. Counsel states that the laws of Ghana provide for the registration of customary law marriages and divorces. This law is the *Customary Marriage and Divorce (Registration) Law* (PNDCL 112) which was amended in 1991 by *Customary Marriage and Divorce (Registration) (Amendment) Law* (PNDCL 263). Counsel attached to the Procedural Fairness Letter response a copy of the *Customary Marriage and Divorce (Registration) Law* (PNDCL 112). He explained that this provides for the registration of customary law divorces in Part II and section 6, in accordance with the Third Schedule to the law. Once the registration is done pursuant to the law and entered by the Registrar of the District [Registrar], the entry shall serve as evidence of the dissolution of the marriage (Section 13).

[24] On its face, s 6(1) of Part II (Registration of Customary Divorce) of the *Customary Marriage and Divorce (Registration) Law* (PNDCL 112) explains that the dissolution of any marriage under this Law must be recorded by the Registrar in the register of divorces, which

must be in the form set out in the Third Schedule. The Applicant adduced evidence of her and her former spouse's dissolution in that form. That document, which appears to be signed by the Applicant, her former spouse, and the Registrar, states that the date of the dissolution of their marriage was December 4, 2018.

[25] On its face, s 7 of Part II explains that, where a marriage under this Law has been dissolved according to applicable customary law, the parties can notify the Registrar of the dissolution, upon which the Registrar will make a statutory declaration stating that the marriage has been dissolved in accordance with applicable customary law, and this declaration will be supported by the spouses' parents, or other guardians. Pursuant to s 7(5), the Registrar may record the dissolution in the register and may, by notice in the form set out in the Second Schedule, notify the public of the registration of the marriage's dissolution. The Applicant adduced evidence of this Second Schedule form. That document, entitled "Second Schedule, Notice of Registration of Customary Marriage or Dissolution of Customary Marriage" states that "NOTICE is hereby given that the marriage* or dissolution of the marriage* between the parties mentioned below was registered in the Register of Marriages and Divorces in accordance with the provisions of the Customary Marriage and Divorce (Registration) Law, on the 21st day of March 2019". Again, the document lists the date of dissolution of marriage as December 4, 2018, and the document is signed by the Registrar.

[26] Moreover, s 9 under Part III of the legislation (Miscellaneous), on its face, explains that upon the dissolution of any marriage the Registrar shall issue a certified true copy to the parties

of the entry in the register upon payment of a registration fee. On my reading of the legislation, this would be the Third Schedule produced by the Applicant, explained above.

[27] I agree with the Applicant that the documents provided to the Officer could serve to establish the dissolution of her former marriage. These documents clearly state the date of dissolution, bear both spouses' signatures, are signed and dated by the Marriage Registrar, and overall, appear to align with the procedures outlined in the *Customary Marriage and Divorce (Registration) Law* (PNDCL 112). The Officer did not engage with this evidence but instead found that, based on the IRCC operation procedures, "a decree, issued by a high court, circuit court or district court stating that the marriage was dissolved in accordance with customary law" was required. There are two problems with this finding.

[28] First, such guidelines offer only guidance. They are not law. The Officer's exclusive reliance on the guidelines and failure to engage with the evidence provided by the Applicant as to the law in Ghana fettered the Officer's discretion and renders the decision unreasonable.

[29] Second, and significantly, although the Respondent points to s 5.33 of OP2 as supporting the Officer's decision, it is unclear to me that it does. Section 5.33 states that the *Divorce Act* also preserves common-law rules respecting the recognition of foreign divorces. It gives as an example, upon which the Respondent relies, that Canadian courts may recognize foreign divorces when:

> they are issued from a court in a country where neither spouse was ordinarily resident, but where the decree is recognized by the law of that country (other than Canada) where one or both were ordinarily resident at the time of the divorce….

[30] I fail to see how this has application in the present circumstance.

[31] And, in any event, the Officer states in the GCMS notes that "as per the IRCC operational procedures, in order to ascertain divorce *from a previous spouse in Ghana*, proper documentation of the dissolution of a customary marriage is required, *which is a decree, issued by a high court, circuit court, or district court stating that the marriage in question was dissolved in accordance with customary law*" (emphasis added). However, OP2 does not refer to any specific requirements for proof of divorce in Ghana, nor does it state that a decree is required. Accordingly, the Officer's interpretation and application of OP2 was unreasonable.

[32] For all of these reasons, the decision is not justified, transparent or intelligible. Therefore, it is unreasonable.

The Decision Was Not Procedurally Fair

Applicant's Position

[33] The Applicant submits that her counsel responded to the May 9, 2023 Procedural Fairness Letter on May 20, 2023. Subsequently, the Officer did not raise any further concerns before refusing her application on December 6, 2023. The Applicant submits that the Officer breached procedural fairness by failing to inform her of the Officer's remaining concerns and to provide her with an opportunity to respond to same. More specifically, that at no time did the Officer advise the Applicant that a decree from a court was required.

Respondent's Position

[34] The Respondent submits that the Officer sent the Applicant two procedural fairness letters. Procedural fairness does not require an immigration officer reviewing an application for permanent residence to confront an applicant with their concerns relating to the inadequacy of an applicant's supporting documentation, or to point out the evidentiary weaknesses of the application. Nor is there a requirement to give notice of a concern where it arises directly from the *IRP Regulations*, as it does in this case. Further, an applicant is not entitled to a running tally to correct deficiencies in their application on an ongoing basis. Here, the Officer satisfied their procedural fairness as identified in the jurisprudence.

Analysis

[35] The first two letters sent by the Officer in September 2022 sought, in error, the Sponsor's proof of divorce. The May 9, 2023 Procedural Fairness Letter was the first correspondence that concerned the dissolution of the Applicant's prior marriage and contained the Officer's request for a copy of the "finalized divorce certificate". The Applicant's response explained why a divorce certificate was not available (i.e., because it was not required for Ghanian marriages dissolved through custom law). The Officer never conveyed to the Applicant their view that the required documentation was, specifically, a decree issued by a court. As a result, the Applicant did not know the case to be met and, without clarification from the Officer, was denied procedural fairness.

JUDGMENT IN IMM-16184-23

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;

2. The decision is set aside and the matter shall be remitted to a different Officer for redetermination;

3. There shall be no order as to costs; and

4. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-16184-23
STYLE OF CAUSE:	ANGELA CROSBY ARTHUR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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