

Federal Court



Cour fédérale

Date: 20251119

Docket: IMM-19963-24

Citation: 2025 FC 1839

Ottawa, Ontario, November 19, 2025

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

Chin Kiu LEE

Applicant

and

**THE MINISTER OF CITIZENSHIP &
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant Chin Kiu Lee is a Chinese national from Hong Kong who came to Canada in 2006. He married his first wife in 2007 and obtained permanent residence in Canada in 2009 through spousal sponsorship. The couple later divorced in 2012.

[2] Mr. Lee married his second and current wife in 2014 and sponsored her for permanent residence. They have a school-age child.

[3] In 2015, Immigration, Refugees and Citizenship Canada [IRCC] received an anonymous tip that Mr. Lee's first marriage was entered into primarily for immigration purposes, contrary to paragraph 4(1)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. IRCC subsequently sent a letter to Mr. Lee raising concerns about the genuineness of his first marriage and providing him with an opportunity to respond. Mr. Lee's counsel at the time responded, admitting to a paid marriage of convenience, expressing regret, and requesting the stay of enforcement action against Mr. Lee on humanitarian and compassionate [H&C] grounds.

[4] IRCC requested additional details regarding the asserted payment of \$33,000, as well as Mr. Lee's living arrangements from 2007 to 2012. Again, Mr. Lee's then-counsel responded, once more admitting that Mr. Lee's first marriage was one of convenience. Additional fact-gathering by IRCC culminated in a report under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] alleging that Mr. Lee is inadmissible to Canada for misrepresentation under paragraph 40(1)(a) of the IRPA.

[5] Inadmissibility hearings before the Immigration Division [ID] and Immigration Appeal Division [IAD] respectively confirmed Mr. Lee's inadmissibility under paragraph 40(1)(a).

[6] See Annex "A" below for relevant provisions.

[7] Mr. Lee seeks to have the IAD's decision set aside, arguing that it is unreasonable because the IAD: 1) put the burden on Mr. Lee, instead of the Respondent Minister of Citizenship and Immigration; 2) made unreasonable findings regarding Mr. Lee's evidence; and 3) unreasonably assessed the H&C factors of establishment, hardship, and the best interests of the child [BIOC].

[8] The Respondent counters that the Applicant's arguments amount to a simple request to reweigh the evidence before the IAD, and that the H&C issue is new, in that it was raised for the first time in the Applicant's Further Memorandum of Argument and thus should not be permitted.

[9] Having considered the parties written material and oral submissions, I find that the IAD's BIOC analysis is flawed, thus warranting the Court's intervention. Although this issue is determinative, I find that Mr. Lee's argument about the burden regarding an allegation against a former representative in the context of an inadmissibility proceeding necessitates judicial response.

II. Issues and Standard of Review

[10] The overarching issue for consideration is the reasonableness of the IAD's decision: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at paras 10, 17, 25. There are no circumstances here, in my view, that displace the presumptive reasonableness standard of review. This matter raises, however, the following more granular issues:

- A. Is the IAD's inadmissibility determination unreasonable?
- B. Should the Court hear Mr. Lee's new H&C arguments?
- C. If yes, is the IAD's H&C determination unreasonable?

[11] In a reasonableness review, the reviewing court must ask itself if the “decision as a whole is transparent, intelligible and justified”: *Vavilov*, above at para 15. The standard is not one of perfection, and the court should exercise caution against engaging in a line-by-line treasure hunt for error: *Vavilov*, above at paras 91, 102, citing *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54. The court nonetheless must consider whether the administrative decision-maker “meaningfully grapple[d] with key issues or central arguments raised by the parties;” a failure to have done so “may call into question whether the decision maker was actually alert and sensitive to the matter before it”: *Vavilov*, above at para 128.

III. Analysis

A. *The IAD's inadmissibility determination is not unreasonable*

[12] Mr. Lee's arguments about whether the IAD's decision is unreasonable are rooted in, although not based solely on, an argument asserting the IAD unreasonably shifted the Minister's burden of establishing inadmissibility to Mr. Lee. I do not agree with Mr. Lee on this point. That said, as stated above and further explained later in these reasons, I find the IAD's BIOC analysis unreasonable and that this issue is determinative.

[13] Turning to the burden issue, Mr. Lee asserts, as I understand it, that the burden on the Minister to prove inadmissibility includes disproving the allegation against Mr. Lee's former representative, Peter T. Lam [PTL]. Mr. Lee argues that the IAD erroneously conflated the incompetency test with the misrepresentation test and, thus, unreasonably shifted the burden of proof to Mr. Lee regarding the allegation against PTL. According to Mr. Lee, this is so because, unlike the usual allegations against a former counsel who was unable to obtain a benefit for their client (such as, for example, permanent residence, a temporary visa, or a work or study permit), PTL engaged in conduct that consequentially could result – and, in this case resulted – in a loss of a benefit (i.e. Mr. Lee's permanent residence).

[14] The Respondent disagrees with Mr. Lee's arguments on this issue because a possible result of Mr. Lee's position, were it accepted, is that it means the Minister sometimes would have the burden to prove that the former counsel was not incompetent. I do not disagree necessarily with the Respondent's submission, in part because of the difficulty in proving a negative. That said, the question could be reworded to ask, as Mr. Lee argues - if an allegation is made, is the Minister required to prove that former counsel is competent in order to make out the case for inadmissibility?

[15] Either way, I do not agree with Mr. Lee's position for at least two reasons. Leaving aside the lack of supporting jurisprudence for Mr. Lee's arguments, I find that, first, an allegation against former counsel is a response to the inadmissibility proceedings; it is not inherent to or a necessary element of the proceedings. Here, the inadmissibility investigation started with an anonymous tip to the effect that Mr. Lee's first marriage was one of convenience.

[16] Second, in my view, the facts about whether counsel acted competently or not are tied to the client's knowledge, who, as a first step, must waive privilege to make an allegation against a former representative. The Minister is not entitled to make the allegation; it is the client who may make an allegation against former counsel and, of necessity, must prove it by, among other things, sending a letter or notice to the former representative outlining the nature of the allegation (i.e. the facts on which the client relies in making the allegation) and providing the counsel against whom the allegation is made with an opportunity for response. As this point shows, the facts that may ground an allegation of incompetence are uniquely within the client's knowledge, not that of the Minister. I note that it was only during the course of a break in the hearing before the ID that Mr. Lee followed the protocol for making an allegation against his former representative.

[17] Although the Minister may rebut any statements offered by an individual who is the subject of inadmissibility proceedings, it does not change the fact, in my view, that the individual still needs to prove the allegation of incompetence as part of their response to the inadmissibility proceeding. It then factors into the IRB's consideration, as part of the applicable constellation of facts, in the overall determination of whether the Minister has met their burden, on a balance of probabilities, to establish inadmissibility.

[18] I add that Mr. Lee has not convinced me that it matters whether the former counsel was unable to obtain a benefit or caused one to be lost, especially where the client may not have been entitled to the benefit in the first place, such as in the case of a misrepresentation.

[19] I thus conclude that Mr. Lee's arguments to the effect that the IAD unreasonably shifted the burden from the Minister to him is without merit. In my view, the IAD understood that the burden was on the Minister to demonstrate that Mr. Lee was inadmissible: see paras 18, 32 of the IAD decision.

[20] Further, the fact that the IAD chose to analyze Mr. Lee's allegation against former counsel prior to confirming the inadmissibility finding makes no substantive difference. I find that this is a logical sequence of considerations.

[21] The IAD explained why Mr. Lee had not rebutted the strong presumption that his former representative's "conduct fell within the wide range of reasonable professional assistance": *R v GDB*, 2000 SCC 22 at para 27. The IAD referred not only to the prior representative's response to the allegation but also to documentary evidence that supported or filled seeming gaps in the response. Simply put, Mr. Lee has not persuaded me that the IAD's reasons for preferring the prior representative's statements and evidence over Mr. Lee's evidence were unreasonable.

[22] As for the remainder of Mr. Lee's arguments about the reasonableness of the IAD's decision, he essentially maintains that the totality of the evidence before the IAD did not support the Minister's allegation of misrepresentation.

[23] The Respondent counters that Mr. Lee's arguments represent disagreement with the IAD's findings and a request to reweigh the evidence, which is not the role of the reviewing court. I agree with the latter principle, having regard to *Vavilov*, above at paragraph 125.

Because, however, the BIOC issue is determinative, as discussed further below, I find it unnecessary to say anything more about the reasonableness of other aspects of the IAD decision.

B. *The Court will hear Mr. Lee's new H&C arguments*

[24] Both parties filed a further memorandum of argument in this proceeding. The Respondent takes issue with what it perceives as new arguments by Mr. Lee in the Applicant's further memorandum concerning the IAD's treatment of H&C grounds. The Respondent argues that the relevant factors for assessing whether the Court should entertain Mr. Lee's new H&C arguments weigh in the Respondent's favour.

[25] During oral submissions, Mr. Lee submitted for the first time that the H&C considerations were in issue before the IAD and core to the IAD's decision; as such, they do not constitute a new issue. I indicated during the hearing that I would reserve on the question of whether Mr. Lee's H&C submissions were properly before the Court. I nonetheless entertained the parties' submissions about the IAD's treatment of the H&C grounds.

[26] Notwithstanding Mr. Lee's lack of submissions addressing the factors the Court may consider in determining whether to exercise its discretion to hear issues raised for the first time in a party's further memorandum, I determine that the Court will consider the arguments regarding the H&C grounds. Further, because I find the IAD's treatment of BIOC unreasonable and determinative, I decline to consider the IAD's reasons regarding the other H&C grounds.

[27] This Court previously has outlined non-exhaustive factors for assessing whether to exercise its discretion to permit issues to be raised in a party's further memorandum of argument for the first time: *Vaghayenegar v Canada (Citizenship and Immigration)*, 2024 FC 1033 [Vaghayenegar] at para 15, citing *Naeini v Canada (Citizenship and Immigration)*, 2024 FC 899 at para 12, and *Al Mansuri v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 22 [Al Mansuri] at para 12. These factors include:

- i. Were all of the facts and matters relevant to the new issue or issues known (or available with reasonable diligence) at the time the application for leave was filed and/or perfected?
- ii. Is there any suggestion of prejudice to the opposing party if the new issues are considered?
- iii. Does the record disclose all of the facts relevant to the new issues?
- iv. Are the new issues related to those in respect of which leave was granted?
- v. What is the apparent strength of the new issue or issues?
- vi. Will allowing new issues to be raised unduly delay the hearing of the application?

[28] Not every factor may be relevant to a particular case; in other words, their application is fact-dependent in each case: *Al Mansuri*, above at para 13.

[29] I also observe that the Court “may ... entertain a new issue ‘where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so’” (citation omitted): *Eli Lilly Canada Inc v Teva Canada Limited*, 2018 FCA 53 at para 45.

[30] Regarding the above factors (i) and (iv), I do not disagree that they favour the Respondent. There is no dispute that all of the facts and matters relevant to the new issue or

issues were known (or available with reasonable diligence) at the time the application for leave was filed, let alone when it was perfected. Further, the IAD's treatment of the H&C grounds is not related to the basis on which leave was granted. The Applicant's initial memorandum of argument did not deal with the H&C grounds issue at all but rather focused on the IAD's asserted unreasonable shifting of the Minister's burden of establishing inadmissibility to Mr. Lee.

[31] Regarding factor (ii), I am not convinced by the Respondent's arguments about possible prejudice. The Respondent admits that there has not been prejudice in the sense of being deprived of the opportunity to respond to the new issue; instead, the Respondent points to extra work necessitated by the new issue. In addition, the situation in *Vaghayenegar* on which the Respondent relies differs from the matter presently before the Court. In *Vaghayenegar*, all of the issues advanced by the applicant in their further memorandum of argument differed from those put forward in their initial memorandum of argument and reply memorandum. Here, Mr. Lee essentially maintained his initial argument and added a new one. The additional argument would have occasioned some extra work for the Respondent, but not to such an extent that the initial work would have been lost. As a consequence, I am not persuaded that the prejudice to the Respondent by reason of Mr. Lee's new issue rises to the same level as in *Vaghayenegar*. I thus view this factor as neutral.

[32] I find that factor (iii) weighs in Mr. Lee's favour because the Respondent does not dispute that the relevant facts are disclosed in the record, and I agree.

[33] Regarding factor (v), the apparent strength of the new issue, the Respondent submits that it weighs in the Respondent's favour because Mr. Lee's arguments on the proposed new issue simply ask the Court to reweigh the evidence that was before the IAD. I disagree as it relates to the BIOC analysis undertaken by the IAD. The new arguments are relatively strong, which I explain in greater detail below, and could have a significant impact on a child's best interests.

[34] Regarding whether permitting the new issue would delay the hearing of the judicial review application, factor (vi), the Respondent focused on the extent to which the new issue would increase the time the Court would require to hear, deliberate and decide on the issue. Because there was no delay in the hearing itself, and absent any jurisprudence cited by the Respondent to support their position, I find this factor neutral overall.

[35] Weighing the above factors, and taking into account the interests of justice and the fact of a sufficient evidentiary record and findings of fact, I determine that the Court will exercise its discretion to hear the Applicant's new arguments as they relate to the IAD's treatment of the H&C grounds, particularly the BIOC analysis. I add that the child in issue should not suffer from the shortsightedness of Mr. Lee's counsel in not arguing this aspect of the IAD decision in their initial memorandum of argument, despite their recognition that the H&C grounds were in issue before the IAD and core to the IAD's decision.

C. *The IAD's H&C determination is unreasonable*

[36] I am satisfied that the IAD's BIOC analysis is unreasonable and that this issue is determinative of the judicial review application. I therefore will not consider Mr. Lee's other submissions on the IAD's H&C findings.

[37] Mr. Lee argues that the IAD made factual errors about his child's abilities in Cantonese; thus, the IAD's conclusion that the child could be enrolled in public school in Hong Kong is unreasonable. Also unreasonable, according to Mr. Lee, was the IAD's finding that he could afford to send his child to private international school instead.

[38] The Respondent's written submissions on this issue are sparse and are subsumed in the general argument that Mr. Lee's submissions amount to mere disagreement with the IAD's weighing of evidence and to an inorganic reading of the decision. In oral argument, the Respondent added that to take issue with the IAD's reference to the child's fluent understanding of spoken Cantonese versus the child's limited ability in Chinese was a microscopic treasure hunt. I disagree.

[39] The Supreme Court of Canada guides that the interests of the child "directly affected" must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence; those interests are a singularly significant focus and perspective: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at paras 39-40. *Kanthasamy* lists (at para 40) a number of factors that may be considered in identifying and defining an

affected child's interests. Further, as this Court recently opined, "to demonstrate that the IAD is alert, alive, and sensitive to the BIOC, its analysis must address the 'unique and personal consequences' that removal from Canada would have for the children affected by the decision" (citations omitted): *Kaur v Canada (Citizenship and Immigration)*, 2025 FC 351 [*Kaur*] at para 22.

[40] In my view, the IAD did not follow this jurisprudential guidance. It did not identify and define what was in the child's best interests, nor did it consider the child's establishment in any meaningful way. The IAD needed to consider the situation that the child would face in Hong Kong, and how this would compare to the child remaining here with family: *Kaur*, above at para 20. I find the comparison wholly absent here. In this instance, the IAD proceeded with the assessment on the assumption that the child could not remain in Canada and focused exclusively on the child's ability to adapt to life in Hong Kong. This is a reviewable error: *Kaur*, above at para 24.

[41] More specifically, while the IAD noted the child's inability to read or write in Cantonese, the IAD did not acknowledge the child's inability to speak the language, to which both parents testified, in its BIOC assessment. For example, the mother testified that although she spoke Cantonese at home with her child, the child answered in English. From this evidence, the IAD concluded that the child understands the language fluently. In my view, this is unreasonable speculation especially given that the child was 7 years old at the time and there is no evidence of the nature and extent of their conversations at home.

[42] In addition, I find that the IAD held illogically that, although the child may not have been taught to read or write Cantonese, the child is doing well in school. There is no evidence, however, that the school in Canada is conducted in any other language than English which the child can read, write, understand, and speak. Because the child cannot read, write, or speak Cantonese, however, the same will not be the case in Hong Kong, especially if the child is enrolled in the public school system there.

IV. Conclusion

[43] For the above reasons, I conclude that the IAD decision is unreasonable and that the judicial review application thus will be granted. The IAD decision will be set aside, with the matter remitted for redetermination by a different decision maker.

[44] Neither party proposed a serious question of general importance for certification. I find that none arises in the circumstances.

JUDGMENT in IMM-19963-24

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted.
2. The October 1, 2024 decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada is set aside. This matter will be remitted to a different decision-maker for redetermination.
3. There is no question for certification.

"Janet M. Fuhrer"

Judge

Annex “A”: Relevant Provisions

Immigration and Refugee Protection Act, SC 2001, c 27
Loi sur l'immigration et la protection des réfugiés, LC 2001, c 27

Misrepresentation 40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation (a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act; Preparation of report 44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	Faussees déclarations 40 (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants : a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi; Rapport d'interdiction de territoire 44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.
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Immigration and Refugee Protection Regulations, SOR/2002-227
Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227

Bad faith 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 (a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or (b) is not genuine.	Mauvaise foi 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) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi; b) n'est pas authentique.
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FEDERAL COURT
SOLICITORS OF RECORD

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