Federal Court  Cour fédérale

Date: 20150817

Docket: IMM-4834-14

Citation: 2015 FC 973

Ottawa, Ontario, August 17, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

VINH QUOC TANG

Applicant

and

THE MINISTER OF IMMIGRATION AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Vinh Quoc Tang has brought an application for judicial review pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA]. Mr. Tang challenges a

decision of the Immigration Appeal Division of the Immigration and Refugee Board [the IAD]. The IAD dismissed Mr. Tang's appeal of a decision of a visa officer to deny his spouse, Thi Thu Ba Cao, a permanent resident visa.

[2] The IAD determined that Mr. Tang's and Ms. Cao's marriage was never registered with the civilian authorities in Vietnam, and they were therefore not married under Vietnamese law. As a result, Ms. Cao was found not to be a member of the family class under s 117(1)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations] for the purposes of immigration to Canada. The IAD also determined that the couple was not in a conjugal relationship. The appeal was dismissed by the IAD for lack of jurisdiction.

[3] For the reasons that follow, I have concluded that the IAD respected Mr. Tang's right to procedural fairness and reasonably concluded that his marriage to Ms. Cao was not valid under the laws of Vietnam. It also reasonably concluded that he was not in a conjugal relationship with Ms. Cao. The application for judicial review is therefore dismissed.

II. Background

[4] Mr. Tang is 57 years old. He was born in Vietnam and is a Canadian citizen. Mr. Tang resides in Canada. Ms. Cao is 41 years old. She is a citizen of Vietnam and resides in that country. On November 21, 2000, Mr. Tang and Ms. Cao participated in a traditional Buddhist marriage ceremony in Vietnam.

[5] Following the marriage ceremony, Mr. Tang and Ms. Cao attempted to register their marriage at an office of the local government, known as the People's Committee, in Vietnam. Mr. Tang and Ms. Cao were informed that they would have to return in ten days' time to receive their marriage certificate. However, Mr. Tang returned to Canada within the 10-day period. Ms. Cao appeared at the office of the People's Committee on her own but was told that the marriage certificate could be released only in the presence of both parties.

[6] Mr. Tang did not return to Vietnam until 2005. Ms. Cao then contacted the office of the People's Committee and enquired about obtaining the couple's marriage certificate. She was told that the marriage certificate could not be located.

[7] In 2008, Mr. Tang's father-in-law submitted an "Application for Confirmation" to the office of the People's Committee to affirm that the couple had in fact been married. The office of the People's Committee affixed a seal to the document confirming that a wedding ceremony had taken place on November 21, 2000.

[8] In 2010, Mr. Tang applied to the High Commission of Canada in Singapore to sponsor Ms. Cao for a Canadian permanent resident visa. The visa officer determined that the couple was not in a *bona fide* marriage and refused the application pursuant to s 4(1) of the Regulations. Mr. Tang filed a Notice of Appeal with the IAD on May 20, 2011.

[9] Before the appeal was heard, the IAD identified the validity of the marriage as a threshold issue affecting its jurisdiction. In correspondence dated August 22, 2013, the IAD

asked Mr. Tang to make written submissions regarding the validity of the marriage under Vietnamese law, and to demonstrate that the 2008 "Application for Confirmation" was sufficient to prove the existence of a legal civil marriage in Vietnam.

[10] On November 19, 2013, Mr. Tang made written submissions to the IAD regarding the "Application for Confirmation" that had been endorsed by the People's Committee. This included an affidavit from Mr. Tang and a statement by Ms. Cao explaining the circumstances surrounding their marriage and their inability to obtain a marriage certificate.

[11] In correspondence dated January 29, 2014, the IAD disclosed that a search of the Internet had revealed Decree No. 184-CP [the Decree], a statutory document governing nuptials between Vietnamese citizens and foreigners. According to Article 1 of the Decree, the statutory document "defines the procedures for registration and recognition of marriage". Article 10 of the Decree stipulates five procedural steps that must be completed for a marriage to be properly registered, culminating in the requirement that both parties appear and collect the marriage certificate from the office of the People's Committee. The IAD invited Mr. Tang and the Minister of Citizenship and Immigration [the Minister] to make submissions regarding the content of the Decree and its application to the appeal.

[12] Mr. Tang conceded the application of the Decree and acknowledged that the couple's inability to collect the marriage certificate from the office of the People's Committee was a procedural defect. He nevertheless maintained that this did not affect the validity of the marriage.

In support of his position, Mr. Tang submitted a legal opinion from Yehuda Levinson, a Canadian lawyer with expertise in the validity of foreign marriages.

[13] If the IAD was not prepared to accept the validity of the marriage, Mr. Tang asked that it exercise its discretion to find that the couple was in a conjugal relationship and maintain jurisdiction to hear the appeal on this basis.

[14] The Minister agreed that the Decree applied and took the position that Mr. Tang's and Ms. Cao's failure to receive the marriage certificate meant that the procedural requirements for registering the marriage had never been met. The Minister also argued that the additional documents provided by Mr. Tang, including Mr. Levinson's legal opinion, had no probative value.

[15] On May 14, 2014, the IAD dismissed the appeal for lack of jurisdiction. Mr. Tang filed an application for leave and for judicial review on June 16, 2014, and an amended application for leave and for judicial review on July 16, 2014. Leave was granted by this Court on February 27, 2015.

III. The IAD's Decision

[16] The threshold issue before the IAD was whether the marriage between Mr. Tang and Ms. Cao was valid for the purposes of immigration to Canada. If not, then the IAD had no jurisdiction to hear the appeal.

[17] The IAD considered the law of Vietnam governing the registration of marriages. The IAD referred to the procedural steps mandated by the Decree, in particular the requirement that both parties be present to receive the marriage certificate before the marriage could be registered. The IAD found that Mr. Tang's and Ms. Cao's failure to receive the marriage certificate meant that the marriage was never registered or given effect.

[18] The IAD rejected Mr. Tang's argument that the failure to receive the marriage certificate had no material effect on the validity of the marriage. The IAD noted that the office of the People's Committee was unable to produce a marriage certificate in 2005. In the words of the IAD, "notwithstanding that a valid traditional marriage took place, it was not registered in accordance with the laws of Vietnam …".

[19] The IAD nevertheless considered whether the record could support a finding that Mr. Tang and Ms. Cao were in a conjugal relationship. In making its assessment, the IAD referred to the "generally accepted characteristics of a conjugal relationship" described in *Molodowich v Penttimen*, [1980] OJ No 1904 (Ont. Dist. Ct.) [*Molodovich*], and endorsed by the Supreme Court in *M v H*, [1999] 2 SCR 3. This non-exhaustive list of characteristics includes: shared shelter, sexual and personal behaviour, domestic services, social activities, economic support, children, and the societal perception of the couple.

[20] The IAD found that there was little to indicate that Mr. Tang and Ms. Cao were in a conjugal relationship. The IAD noted that at the time of the sponsorship application, the couple had spent fewer than two months together since their marriage ceremony in 2000 and Mr. Tang

had not seen Ms. Cao since 2005. The IAD also observed that there was a lack of evidence to confirm financial support between Mr. Tang and Ms. Cao. The IAD accepted that the couple were perceived as married by their respective communities; however, the absence of evidence to support the remaining six factors demonstrated that there was no conjugal relationship between them.

[21] Given that the marriage was never registered and the couple was not in a conjugal relationship at the time of the sponsorship application, the IAD concluded that Ms. Cao was not a member of the family class for the purposes of immigrating to Canada. The IAD therefore dismissed the appeal for lack of jurisdiction.

IV. Issues

[22] This application for judicial review raises the following issues:

A. Did the IAD breach Mr. Tang's right to procedural fairness?

B. Was the IAD's finding that Mr. Tang's and Ms. Cao's marriage was not valid under Vietnamese law reasonable?

C. Was the IAD's finding that Mr. Tang and Ms. Cao were not in a conjugal relationship reasonable?

V. Analysis

[23] Questions of procedural fairness are reviewable by this Court against the standard of correctness (*Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 [*Khosa*] at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79). This Court should nevertheless afford some deference to the IAD's procedural choices (*Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 245 at paras 70-72). This does not alter the standard of review, but it may affect this Court's assessment of the scope of the IAD's duty and whether it was breached (*Aguirre v Canada (Minister of Citizenship and Immigration)*, 2015 FC 281 at para 31; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21, 27).

[24] The IAD's assessment of Vietnamese law is a question of fact that is reviewable by this Court against the standard of reasonableness (*Kenne v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1079 at para 11).

[25] The IAD's assessment of whether Mr. Tang and Ms. Cao were in a conjugal relationship is also subject to the standard of reasonableness (*Traverse v Canada (Minister of Citizenship and Immigration)*, 2014 FC 551 [*Traverse*] at para 11).

[26] A reasonable decision is one that is justified, transparent and intelligible, and that falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* v *New Brunswick*, 2008 SCC 9 at para 47; *Khosa* at para 59).

A. Did the IAD breach Mr. Tang's right to procedural fairness?

[27] Mr. Tang says that the IAD breached his right to procedural fairness by: a) failing to provide him with an opportunity to address the IAD's concerns regarding the validity of the marriage; b) failing to give him an opportunity to provide evidence that the couple was in a conjugal relationship; and c) failing to conduct an oral hearing before making its decision.

[28] The threshold issue to be decided by the IAD was the validity of the couple's marriage under Vietnamese law. This was explained to Mr. Tang in correspondence from the IAD dated August 22, 2013:

> Before the matter of the refusal under section 4(1) of the Regulations can be determined the issue of whether or not the appellant [Mr. Tang] and applicant [Ms. Cao] are legally married must be addressed. The only document that speaks to a marriage is found at page 35 of the Record which is a translation of a document prepared by the applicant's father dated June 28, 2008 that attests to the fact that on November 21, 2000 a wedding party took place and which is "affirmed" by the Village people's committee. On what basis the affirmation is made is not known.
>
> The appellant must demonstrate that this document in law is acceptable as evidence of a legal civil marriage in Vietnam which would be recognised in Canadian law as a marriage for the purpose of immigration.
>
> As legal validity of the marriage is a threshold issue the hearing on the refusal cannot proceed until the panel is satisfied that in fact a legal marriage exists.

[29] Mr. Tang made written submissions in response to this correspondence and further written submissions regarding the application of the Decree. Following its consideration of Mr. Tang's submissions and those of the Minister, the IAD concluded that Mr. Tang's and Ms. Cao's marriage had never been registered under Vietnamese law.

[30] If an applicant knows the case to be decided by the IAD and is given the opportunity to submit evidence and arguments, and if the IAD bases its decision on the material before it, then there is no breach of procedural fairness (*Williams v Canada (Minister of Citizenship and Immigration)*, 2008 FC 655). I am satisfied that Mr. Tang, who was represented by counsel, was given ample opportunity to address the issues that were clearly identified by the IAD, and that the IAD based its decision on the material that was submitted by the parties for its consideration.

[31] Mr. Tang says that he should have been given a further opportunity to provide evidence that he and Ms. Cao were in a conjugal relationship. He argues that this flowed from his request for a "Tabesh conversion" (*Tabesh v Canada (Minister of Citizenship and Immigration)*, [2004] IADD No 2 [*Tabesh*]). In *Tabesh*, the IAD found that if a person applies to be sponsored as a member of the family class and is refused based on the formal validity of the marriage, it is incumbent to consider whether the person could be either a conjugal or common-law partner.

[32] The "Tabesh conversion" is a creation of the IAD. It appears to be derived from s 67(2) of the IRPA, which states that where the IAD allows an appeal it may set aside the original decision and substitute the determination that "in its opinion, should have been made". However, opinion is divided among members of the IAD regarding its authority to make such a conversion (*Rahimi v Canada (Minister of Citizenship and Immigration)*, 2014 CarswellNat 6113 (Imm. and Ref. Bd. (App. Div.))). Even where the authority is believed to exist, the decision to permit such a conversion is wholly discretionary (*Shahabi v Canada (Minister of Citizenship and Immigration)*, 2006 CarswellNat 6397 (Imm. and Ref. Bd. (App. Div.))).

[33] Assuming, without deciding, that the IAD had a duty to consider an alternative category of relationship under s 117(1)(a) of the Regulations, the onus was on Mr. Tang to provide sufficient credible evidence in support of his request (*Oladipo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 366 at para 24). The IAD was not required to invite additional submissions regarding the possible existence of a conjugal relationship once it found that the formal requirements of a marriage under Vietnamese law had not been met.

[34] A decision-maker's discretion extends to deciding whether a hearing will be conducted orally or in writing (*Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48 [*Re: Sound*] at para 37). Considerable deference is owed to procedural decisions made by a tribunal with the authority to control its own process (*VIA Rail Canada Inc v Canadian Transportation Agency*, 2007 SCC 15 at para 231).

[35] The *Immigration Appeal Division Rules*, SOR/2002-230 govern procedural matters before the IAD. Rule 25(1) permits the IAD to require parties to proceed in writing if this does not result in prejudice and if there is no need for oral testimony. This is consistent with the requirement in the IRPA that the IAD's proceedings are to be conducted as informally and expeditiously as the circumstances and considerations of fairness and natural justice allow (IRPA, s 162(2)).

[36] I am satisfied that the IAD's choice of procedure was consistent with the IRPA and should be afforded deference in these circumstances (*Re: Sound*). The matters under

consideration did not require oral testimony. Mr. Tang, assisted by counsel, was given a sufficient opportunity to address them through his written submissions.

B. Was the IAD's finding that Mr. Tang's and Ms. Cao's marriage was not valid under Vietnamese law reasonable?

[37] Mr. Tang complains that the IAD ignored the legal opinion of Mr. Levinson and did not provide reasons for its conclusion that registration was a formal requirement of a valid marriage under Vietnamese law.

[38] The IAD was concerned primarily with the procedural requirements of the Decree, which Mr. Levinson did not address in his opinion. Mr. Levinson focused on the nature of the traditional Buddhist marriage ceremony that had taken place and the "normal incidents of marriage" that occurred afterwards, including "prayers, [the] exchange of gifts and a festival meal". Mr. Levinson referred to the "Application for Confirmation" prepared by Ms. Cao's father and asserted that it served in lieu of a marriage certificate. However, Mr. Levinson offered no authority for this conclusion. The seal affixed to the document by the People's Committee stated only that Ms. Cao's father "has truly organized a wedding party for his daughter". This did not assist the IAD in resolving whether the marriage was registered with the civilian authorities in accordance with the laws of Vietnam.

[39] The IAD acknowledged Mr. Levinson's opinion but found it to be inconclusive. It did not overlook this evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No1425 (Fed TD) at para 17).

[40] Similarly, there is no merit to Mr. Tang's assertion that the IAD's decision was unjustified or unintelligible because the IAD did not give reasons for its emphasis on the requirement that the marriage be registered. The IAD's concerns were well-founded and its rationale for requiring evidence of the marriage's registration was clear:

> It is not the absence of the marriage certificate *per se* that is the issue. The non-existence of a marriage certificate is but a manifestation of the issue which, as stated, is whether or not there is evidence that the appellant [Mr. Tang] and the applicant [Ms. Cao] are legally married for the purposes of immigration and secondarily the arising jurisdictional issue. The matter does not turn on the existence or non-existence of the marriage certificate, but on whether or not there is evidence that the couple were married in accordance with the laws of Vietnam. Focus on the marriage certificate alone unduly takes attention away from the question of registration, which the respondent is correct in linking to the marriage register.

[41] The documentary evidence considered by the IAD included a publication of the Research Directorate of the Immigration and Refugee Board titled "Vietnam: Information on what constitutes a valid marriage, particularly on whether it is necessary to have a ceremony." According to this document, "[t]o be valid, a marriage in Vietnam must be approved by the Uy Ban Nhan Dan (People's Committee) of the township, village or ward where one of the marrying parties resides, and registered in the Marriage Registry (sect. 8). All other acts to celebrate marriage would not be legal (ibid)." References are to the Vietnamese *Marriage and Family Law*, 29 December 1986, which was also filed in evidence before the IAD. As the IAD found, the couple's failure to meet the procedural requirements for registering the marriage as prescribed by Article 10 of the Decree rendered the marriage invalid.

[42] The IAD therefore reasonably concluded that the evidence adduced by Mr. Tang failed to establish that the marriage was valid under the laws of Vietnam.

C. Was the IAD's finding that Mr. Tang and Ms. Cao were not in a conjugal relationship reasonable?

[43] A "conjugal partner" is defined in s 2 of the Regulations as follows:

> [I]n relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year.
>
> [Emphasis added.]

[44] Mr. Tang says that the IAD wrongly restricted its analysis to the one-year period preceding the filing of the sponsorship application. Mr. Tang points to the following excerpt from paragraph 72 of the IAD's decision:

> [72][…] The panel could consider that the couple enjoyed a conjugal relationship if there was evidence to that effect in the year prior to the [application for permanent residence] which was made in January 2010.
>
> [Emphasis added.]

[45] However, the IAD correctly described the legal test for establishing a conjugal relationship at paragraph 68 of its decision:

> [68] […] [I]n order to establish the fact of a conjugal relationship the couple would minimally have to satisfy the definition of conjugal partners which, according to the definitions section of the Regulations "means, in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been for a period of at least one year."

[46] The IAD also noted that "conjugal relationship" is not defined in the Regulations and correctly described the criteria of a conjugal relationship found in *Molodowich*. The IAD examined Mr. Tang's relationship with Ms. Cao against these non-exhaustive factors, noting that Mr. Tang had not seen Ms. Cao since 2005 and that the couple had spent fewer than two months together since their marriage ceremony in 2000. The panel also noted the lack of evidence to demonstrate any financial support between Mr. Tang and Ms. Cao.

[47] The Supreme Court has cautioned against the "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp and Paper, Ltd*, 2013 SCC 34 at para 54). While the excerpt relied upon by Mr. Tang does appear to contain an error, it is clear from reading the decision as a whole that the IAD correctly described the law and characteristics of a conjugal relationship and applied these to the facts with adequate sensitivity to the fact that Mr. Tang and Ms. Cao were living in separate countries (*Traverse* at para 15). I am satisfied that the decision of the IAD is supported by the record and the minor error identified by Mr. Tang does not undermine the reasons given (*N.L.N.U. v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14, 15).

VI. Conclusion

[48] For the foregoing reasons, the application for judicial review is dismissed. No question is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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