

Federal Court



Cour fédérale

**Date: 20170421**

**Docket: IMM-3558-16**

**Citation: 2017 FC 386**

**Ottawa, Ontario, April 21, 2017**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**LEKSI GJOKA**

**Applicant**

**and**

**THE MINISTER OF IMMIGRATION,  
REFUGEES AND CITIZENSHIP CANADA**

**Respondent**

**JUDGMENT AND REASONS**

**I. INTRODUCTION**

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act, SC 2001, c 27 [Act]* for judicial review of the decision of a Member of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada dated August 2, 2016 [Decision], which dismissed the Applicant's appeal of his wife's application for permanent residence as a member of the family class.

## II. BACKGROUND

[2] The Applicant is a 35-year-old citizen of Albania. He entered Canada as a refugee in 2006 and became a permanent resident in 2013. The basis of his refugee claim was a family feud with another family in his hometown of Shkoder, and he has not returned to Albania since he came to Canada.

[3] In December 2012, the Applicant travelled to Montenegro and was introduced to his now-wife, Silvana Gjoka [Silvana], through a mutual family member. A month later, both families agreed to a marriage between the Applicant and Silvana. The Applicant returned to Canada and communicated with Silvana via telephone.

[4] In June 2013, the Applicant returned to Montenegro and entered into a civil marriage with Silvana on July 22, 2013. The families did not attend the wedding and the marriage was not consummated. Five days after the civil marriage, the Applicant returned to Canada.

[5] On September 18, 2013, the Applicant filed an application to sponsor Silvana for immigration to Canada and was interviewed by a visa officer on February 14, 2014. On June 12, 2014, the application was refused by the visa officer pursuant to s 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] on the grounds that the marriage was not genuine and had been entered into by Silvana primarily for the purpose of acquiring any status or privilege under the Act.

[6] Following the refusal, the Applicant returned to Montenegro and held a wedding celebration with Silvana on July 21, 2014 that was attended by approximately three hundred guests. Since then, the Applicant has often travelled between Canada and Montenegro in order to spend time with Silvana.

[7] The Applicant and Silvana appealed the refusal to the IAD and a hearing was conducted over two half-days on May 19, 2016 and June 13, 2016.

### III. DECISION UNDER REVIEW

[8] A Decision by the IAD on August 2, 2016 determined that Silvana did not qualify for immigration to Canada in the family class.

[9] The IAD began with a review of the visa officer's refusal. The application had been refused on the basis that Silvana was excluded due to bad faith under s 4(1) of the Regulations. The decision had been based on: discrepancies between the application forms and interview statements; the absence of the families at the civil marriage ceremony; the lack of a marriage celebration following the civil marriage ceremony; Silvana's post-nuptial living arrangements; and the scarcity of telephone records and photographs provided. The visa officer concluded the marriage was not genuine and was entered into primarily to acquire status or privilege under the Act.

[10] The IAD then considered the background information related to the Applicant and Silvana, including the circumstances under which they met and married. The IAD also noted the events following the civil marriage ceremony.

[11] Next, the IAD discussed the Applicant's testimony. With regards to the question of whether Silvana had previously been married, the Applicant responded, "Not as far as I know." The IAD found this response odd because the factors of age and marital status are usually considered in an arranged marriage.

[12] The IAD also took issue with the Applicant's testimony that Silvana did not have knowledge of the reason why the Applicant had not returned to Albania. The IAD noted that it was unusual for Silvana not to inquire as to why the Applicant had never visited her family despite the lack of difficulty involved in crossing the Albania-Montenegro border and concluded the information was likely not shared because the marriage was not genuine.

[13] The absence of the families at the civil marriage ceremony was the next consideration. Although Silvana had stated the reason was because the families were busy, she had written in her application that she and the Applicant intended to celebrate the marriage in Canada. The IAD found this odd because their immediate family members resided in Albania and it would be more convenient to celebrate the marriage in Albania; additionally, the intention to celebrate the wedding in Canada heightened the significance of the civil marriage ceremony.

[14] The IAD then assessed the couple's religious affiliations and beliefs. The Applicant had testified that he and Silvana did not live together after the civil marriage ceremony because, according to Catholic custom, they were required to wait until after the religious ceremony. Additionally, the Applicant explained the reason that they did not have an immediate wedding celebration was because their older family members would have difficulty travelling to Montenegro and because they had assumed the immigration process would be quick enough to allow them to have the celebration in Canada. The IAD took issue with several points with this testimony: there was no evidence of any religious components in the photographs of the wedding celebration; the Applicant later testified that it never came to his mind to have a Catholic ceremony; and the photographs of the wedding celebration included elderly people. Based on these concerns, the IAD concluded that the wedding celebration was for the purpose of the sponsorship application. Additionally, the IAD found the wedding celebration did not address the couple's intentions at the time of the civil marriage ceremony.

[15] In discussing declarations provided from the Applicant's family members and friends, the IAD noted that they failed to mention the civil marriage ceremony, which cast further doubt on the couple's intentions at the time of the civil marriage ceremony.

[16] Looking next to the testimony regarding the day of the marriage proposal, the IAD found discrepancies between the couple's statements. The Applicant had testified that Sandu Marku, Silvana's mother, and Silvana's aunt were present; however, Silvana had testified that only Mr. Marku and her sister were present, although she had previously stated the proposal was attended by her mother and the Applicant's sister-in-law. The Applicant also testified that after the initial

meeting, he did not see Silvana again until the summer of 2013; conversely, Silvana stated they had met again a few days after the proposal. The IAD did not find the explanations for these discrepancies to be reasonable, particularly because the occasion was so important.

[17] The IAD also found the Applicant's testimony to be vague without sufficient explanation, noting: that he could not recall the hotel where the marriage had been consummated; the lack of specificity regarding their conversations; the failure to recall whether his friends had met Silvana during visits to Albania; and the inconsistency between his answer and his wife's with regards to how often Silvana visited her family.

[18] Additionally, the IAD took issue with the discrepancy between the Applicant's testimony regarding his travels to Montenegro and the supporting documentation provided.

[19] With regard to Silvana's testimony, the IAD also found her answers to be vague. The IAD noted: the failure to recall any memorable moment with the Applicant; the failure to recall the name of the village in which the couple had stayed together for months; the failure to recall when she received her engagement ring or who was with her at the time; the discrepancy between answers with regards to whether the Applicant had spoken to her cousins in Canada; and the failure to recall how often she saw the Applicant on his trip to Montenegro in December 2013.

[20] Moreover, the IAD took issue with the discrepancies between the couple's answers. The Applicant had stated he sent Silvana \$2,000 every one or one-and-a-half months for a total of

four to five payments; Silvana testified he sent funds in the amounts of \$500 or \$1,000 but could not recall the frequency. Additionally, the Applicant testified the couple had never stayed with relatives but Silvana stated they had stayed at a relative's residence in Tuzi, Montenegro.

[21] The lack of evidence regarding the couple's plans for the future was also considered by the IAD to be not indicative of a genuine marriage. Although the Applicant testified about their plans regarding children, there were no other concrete plans.

[22] The IAD acknowledged the Applicant's frequent travels to Montenegro after the civil marriage ceremony; however, the IAD also noted that the Applicant had also travelled to Montenegro in June 2012, prior to meeting Silvana. The IAD found that this demonstrated his visits were also for the purpose of visiting his other family members.

[23] Additionally, the IAD took into consideration the evidence provided by the Applicant; specifically, the telephone bills, invoices from a jeweller, and an appraisal of an engagement ring. However, the IAD found the couple's lack of knowledge of each other despite extensive communication was not indicative of a genuine marriage. Furthermore, the Applicant's failure to recall the trip in which the engagement ring was presented to Silvana raised concerns about whether the ring was purchased to bolster their application.

[24] Finally, the IAD mentioned some positive factors, including the Applicant's frequent trips to Montenegro and the engagement ring. However, the IAD found the positive factors were not sufficient to overcome the concerns of the visa officer; namely, the inconsistencies in the

couple's testimonies, the lack of evidence as to why the marriage was considered to be compatible, the lack of knowledge between the couple concerning each other's background, and the lack of future plans.

[25] The IAD also noted that although Silvana did not have immediate family in Canada, she was the eldest of four siblings and her entry could facilitate her siblings' eventual entry.

[26] After consideration of all the evidence, the IAD concluded on a balance of probabilities that the marriage was not genuine and was entered into primarily to facilitate Silvana's entry to Canada. Accordingly, the appeal was dismissed.

#### IV. ISSUES

[27] The Applicant submits the following are at issue in this application:

- (1) The IAD's allegation that Silvana's primary intention is to gain admission to Canada and sponsor her family is mere speculation and not supported by evidence.
- (2) The IAD failed to take into consideration the cultural context and, instead, rendered an unreasonable Decision by relying on insignificant discrepancies and misconstruing the evidence in support of the application.



## V. STANDARD OF REVIEW

[28] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[29] This Court has held that the determination of whether a marriage is genuine is a question of mixed fact and law, which attracts a reasonableness standard: *Bercasio v Canada (Citizenship and Immigration)*, 2016 FC 244 at para 17.

[30] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” See *Dunsmuir*, above, at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that

it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

## VI. STATUTORY PROVISIONS

[31] The following provisions from the Act are relevant in this proceeding:

### **Application before entering Canada**

11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

...

### **Appeal allowed**

67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

(a) the decision appealed is wrong in law or fact or mixed law and fact;

(b) a principle of natural justice has not been observed; or

(c) other than in the case of an appeal by the Minister, taking into account the best interests

### **Visa et documents**

11 (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

...

### **Fondement de l'appel**

67 (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

b) il y a eu manquement à un principe de justice naturelle;

c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de

of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[32] The following provisions from the Regulations are relevant in this proceeding:

**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.

...

**Family class**

116 For the purposes of subsection 12(1) of the Act, the family class is hereby prescribed as a class of persons who may become permanent residents on the basis of the requirements of this Division.

**Member**

117 (1) A foreign national is a

**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.

...

**Catégorie**

116 Pour l'application du paragraphe 12(1) de la Loi, la catégorie du regroupement familial est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents sur le fondement des exigences prévues à la présente section.

**Regroupement familial**

117 (1) Appartiennent à la

member of the family class if, with respect to a sponsor, the foreign national is

catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :

(a) the sponsor's spouse, common-law partner or conjugal partner;

a) son époux, conjoint de fait ou partenaire conjugal;

## VII. ARGUMENTS

### A. *Applicant*

#### (1) Third Party Affidavit

[33] The Applicant has filed a third party affidavit instead of a personal affidavit for two reasons. First, a third party affidavit is permissible when the alleged errors appear on the face of the record, as is the case in this judicial review: *Koky v Canada (Citizenship and Immigration)*, 2011 FC 1407 at para 24. Second, both the Applicant and Silvana were out of the country at the time of filing, which created logistical difficulties in filing personal affidavits.

#### (2) Speculation

[34] The Applicant submits that the IAD speculated about Silvana's intent without supporting evidence. The IAD found the marriage was entered primarily to allow Silvana entry into Canada and to facilitate her family's admission to Canada. However, the testimony noted to support this finding was used out of context and was not provided spontaneously by the Applicant; rather, it was a response to a leading question from the IAD, which diminishes its evidentiary value.

[35] Apart from this testimony, there is no other evidence to support the IAD's finding that the decision to marry was a ploy. Besides her marriage to the Applicant, Silvana has no obvious pull to Canada: she was an 18-year-old from a rural Albanian village; she does not speak English; she had no employment history; she had never lived away from her family; she had only distant cousins in Canada; and she had never previously attempted to enter Canada. There is also no evidence that she would meet the minimum necessary income required to sponsor her family. Furthermore, this concern was never put to Silvana and is a breach of her right to procedural fairness.

[36] Additionally, the IAD failed to consider the evidence that demonstrated the marriage was genuine. For example, the fact that the Applicant filed a sponsorship application quickly after the civil marriage is more obviously indicative of the couple's desire to be together as soon as possible and start a family. Moreover, the deferral of the marriage celebration was due to the Applicant's inability to return to Albania and the interruption of his earnings as a result of the frequent trips he had to make to Montenegro to be with his wife following the refusal.

### (3) Cultural Context

[37] In *Gill v Canada (Citizenship and Immigration)*, 2010 FC 122 [*Gill*] at paras 7-8, Justice Barnes held that when looking at the genuineness of the marriage, the IAD must be careful not to apply Western conceptions of marriage and that the assessment of evidence should not be concerned with trivial, inconclusive, or irrelevant matters while ignoring considerable contradictory evidence.

[38] The Applicant submits that the IAD did not understand the interactions between a husband and wife differ in Albania from Western cultural norms. In the Decision, the IAD wrote, "...it is simply not believed that she would not have asked about his past or her family would not have made inquiries given that the appellant's fear of return to Albania is so great that he stays in Montenegro, rather than entering Albania." First, the inference that Silvana had not asked questions regarding the Applicant's past is inaccurate: in actuality, she was aware of the blood feud but did not ask for details as she understood the Applicant did not wish to discuss it. This is confirmed in Silvana's interview with the visa officer on February 18, 2014 and the Applicant's testimony at the IAD hearing. Second, details regarding death or tragedy are not part of the custom of arranged marriages in Albania, a patriarchal society where women are dependent and subordinate to men. In light of the cultural context, it is reasonable for Silvana not to have known the details of the Applicant's blood feud and this should not have been viewed as amounting to a lack of genuineness.

[39] The Applicant also argues that the IAD misinterpreted the customs surrounding the wedding celebration. A religious element is not required; instead, attendees gather to publicly celebrate the union. The IAD took issue with the lack of a religious element in the wedding celebration, but the Applicant had clarified at the hearing that Albanian culture requires a declaration to the community of the union before the marriage can be consummated. The IAD misunderstood this and drew an adverse inference from the lack of a religious component in the wedding celebration.

(4) Material and Supporting Evidence

[40] The Applicant contends that the IAD was prone to speculation and disregarded significant portions of evidence in the Decision.

[41] The IAD found that the couple had conducted the wedding celebration for the purpose of the sponsorship application and to address the concerns of the visa officer. However, the Applicant explained that the decision to have the wedding celebration in 2014 was due to the realization that the sponsorship process would take a long time and Silvana would not be able to reside with the Applicant's family in the meantime. The IAD's failure to mention the Applicant's explanation is unreasonable and is akin to the deficiencies identified in *Paulino v Canada (Citizenship and Immigration)*, 2010 FC 542 and *Basra v Canada (Minister of Citizenship and Immigration)*, 2009 FC 535, where the decision-makers discounted evidence without engaging in a weighing analysis.

[42] The same problem arises in the IAD's treatment of the declarations from the Applicant's friends and family. Rather than focusing on what the documents actually say, the IAD focused on what the documents did not say; this is a reviewable error: *Mahmud v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 729 at para 11 [*Mahmud*]. The Applicant submits that it was unreasonable for the IAD to draw a negative inference from the fact that the letters did not mention the civil marriage, especially considering the Applicant's testimony that the public wedding celebration is what is important in Albanian culture.

(5) Indicia of Compatibility

[43] The Applicant also submits that the IAD erred in finding that there was no evidence as to why the couple was considered compatible when, in fact, there were several important indicia of compatibility: they were both from Shkoder; the marriage was arranged by their families; neither had been previously married; they had comparable levels of education; they spoke the same language; and they are both Catholic. Furthermore, the IAD was over-analytical in regards to the Applicant's response to the question whether Silvana had been previously married; English is not the Applicant's first language and his answer, "Not as far as I know," was just a phrase.

(6) Inconsistencies

[44] The Applicant argues that the IAD did not engage with the important available evidence; rather, the IAD focused on insignificant discrepancies in the testimony and information contained in the documentation to find the marriage was not genuine. Some of the identified inconsistencies were not in fact inconsistencies. For example, the Applicant testified that the couple were not using birth control despite not trying to get pregnant; this is not an inconsistency. Nor is the Applicant's testimony regarding the date of the civil marriage ceremony; the IAD stated that he testified he remained in Montenegro for a month after the civil marriage ceremony but he actually testified that he arrived a month before the civil marriage ceremony. This misapprehension of the evidence was used to support the IAD's claim that the Applicant attempted to bolster the genuineness of the marriage, but it is unfounded. The IAD also took issue with the Applicant's inability to recall details such as the names of hotels, length of travel, and frequency of remittances, all of which can be reasonably attributed to inevitable memory gaps due to the passage of time. Similarly, other details that could not be recalled, such as how frequently Silvana visits her family, can be explained by errors of approximation and the



fact that the couple live far apart from one another. Finally, the fact that the couple discuss mundane matters and cannot recall a notable event that occurred the week prior is not a factor that should be considered in the determination of the genuineness of the marriage.

[45] It is submitted that it was improper for the IAD to base its findings on irrelevant and peripheral matters, as “[a]dverse plausibility findings should only be made in the clearest of cases, where the facts presented are so outside the realm of what could reasonably be expected that the trier of fact can reasonably find that it could not have possibly happened”: *Divsalar v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 653 at para 24.

[46] The IAD’s conclusions were essentially plausibility findings dependent on negative inferences that are not supported by facts or logic while ignoring extensive supportive evidence. Additionally, the Decision is culturally insensitive and does not account for the practices and expectations of the patriarchal society in which Silvana lives. The IAD’s inferences and conclusions also do not address the strong evidence that supports the opposite conclusion.

## B. Respondent

### (1) Weight of Evidence

[47] The IAD is fully entitled to determine the plausibility and credibility of the testimony and the evidence which is before it, as credibility and weight of evidence are matters for a tribunal to decide. The Respondent submits that, in the Decision, the IAD took issue with multiple

inconsistencies and problems with the evidence and the Applicant's arguments are a thinly disguised attempt to reargue the evidence to obtain a different result.

(2) Findings Based on Evidence

[48] The Respondent argues that the IAD's findings were based on all the evidence and the reasons were focused on, although not limited to, the genuineness of the Applicant's marriage. This evidence was also applicable to determining that the relationship's primary purpose was to achieve status under the Act, which is reasonable since evidence that leads to a finding that the marriage is not genuine raises the presumption that it was entered into for the purpose of gaining status: *Kaur v Canada (Citizenship and Immigration)*, 2010 FC 417 [*Kaur*] at para 16.

[49] The IAD also did not speculate about the Applicant's intent without the support of evidence; it is actually the Applicant's own testimony that was used. The Applicant stated:

[**APPLICANT**]: ...And the second thing was I wanted to apply as far as I could. So I can get together with her here.

...

[**APPLICANT**]: The second reason was because I thought we were going to have a fast applying...for a visa.

...

**MR. HARSANYI**: Okay. So your plan was to then have a marriage – you know it was your understanding that when you say visa you mean the spouses sponsorship?

[**APPLICANT**]: Yes, I thought there will be an approval, and she'll come here and we would do the marriage here.

[50] In assessing intent, the IAD correctly considered the Applicant's testimony about what he was thinking prior to the marriage in 2013. In *Gill*, above, at para 29, the Court confirmed that s 4 of the Regulations contains two distinct tests: an assessment of whether the impugned marriage is not genuine and an assessment of whether the marriage was entered into primarily for the purpose of acquiring any status under the Act. In regards to the latter, the focus is on the intentions of the parties at the time of the marriage, which was the IAD's focus in the present case. The Respondent submits that there is no reviewable error and the Applicant merely seeks to reargue the evidence, but it is not for the Court to reweigh the evidence.

### (3) Cultural Context

[51] The Respondent contends that the IAD did not fail to demonstrate cultural sensitivity; rather, the refusal was based on multiple inconsistencies and contradictions in testimonies, vague answers, and other serious issues. The Albanian cultural context was considered but did not explain the inconsistencies in the evidence. The Respondent submits that the Applicant's argument is an attempt to distract from the material issues, which are the credibility concerns identified in the reasons.

[52] Credibility is an aspect central to the analysis of the genuineness of a relationship: *Keo v Canada (Citizenship and Immigration)*, 2011 FC 1456 at para 23. Thus, the IAD's examination of the testimony related to the circumstances of the relationship, the type of wedding, and contradictory evidence of actual cohabitation in 2013 and 2014 was not an erroneous approach. The jurisprudence requires the IAD to demonstrate cultural sensitivity and evaluate a marriage within the cultural context in which it took place, but there is no specific test established for

determining whether a relationship is genuine; the relative weight to be given to the evidence is exclusively determined by the tribunal: *Zheng v Canada (Citizenship and Immigration)*, 2011 FC 432 at para 23.

[53] Contrary to the Applicant's argument, the IAD recognized that arranged marriages in Albania occur within a patriarchal culture; however, given that it was an arranged marriage, the IAD found no reasonable explanation as to why Silvana learned only a month prior to her testimony about why her husband was unable to return to Albania. This is not a speculative error fueled by cultural insensitivity, but a credibility finding that was considered by and reasonably open to the IAD based on the evidence.

#### (4) Inconsistent Evidence

[54] The Respondent submits that the IAD did not misapprehend the evidence about a religious wedding since the Applicant clearly indicated the personal significance of a religious ceremony in his testimony. Thus, it was open for the IAD to draw an adverse inference from the inconsistency between the Applicant's testimony about the importance of a religious ceremony and his later testimony that he could not find a Catholic church in Montenegro or had not discussed the matter with his Catholic spouse. The Applicant's testimony on the issue was inconsistent throughout the hearing, which led to the IAD's finding a lack of credibility in the Applicant's responses.

[55] Additionally, the Respondent submits that given the Applicant's testimony about the importance of the religious ceremony, the Applicant's argument that the IAD confused the wedding celebration with a religious ceremony is absurd.

(5) Evidence Not Overlooked

[56] The Respondent argues that the IAD did not disregard the Applicant's reason for the wedding celebration. The IAD assessed all the evidence, with regard to the photos depicting elderly people in particular, and noted that there was no evidence that it caused them difficulty to travel, which contradicts the Applicant's testimony that the couple chose to only have a civil marriage ceremony because it would be difficult for their elderly relatives to travel to Montenegro. Given the contradiction, it was reasonable for the IAD to make the credibility finding that the couple had a wedding celebration for the purpose of the sponsorship application and to address the visa officer's concerns.

[57] Moreover, a tribunal is presumed to have considered all the evidence before it even if it does not address specific evidence: *Lai v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at para 90. The mere fact of not mentioning all of the evidence is not sufficient to rebut the presumption: *Vézina v Canada (Citizenship and Immigration)*, 2011 FC 900 at para 19. As determined in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14, adequacy of reasons is not a stand-alone basis for judicial review. In the present case, the IAD provided adequate reasons to satisfy the duty of fairness by detailing the discrepancies and explaining why the discrepancies led to the final

conclusion. Furthermore, the cultural context was considered but could not explain the discrepancies.

[58] Contrary to the Applicant's submissions, the IAD did not fail to weigh the positive evidence in the Applicant's favour; this evidence was specifically considered but was insufficient to overcome the negative evidence, such as the contradictory and vague testimony.

[59] Nor did the IAD err in noting that the letters from the Applicant's family and friends failed to mention the civil marriage ceremony. The Applicant had testified that their immediate family members did not attend the civil marriage ceremony because they were too busy, which raised concerns regarding the couple's intent; thus, it was reasonable for the omission to be noted. Additionally, the IAD did not find that the letters contradicted the Applicant's evidence, but that they had limited value for supporting a genuine intent in 2013.

[60] The IAD's finding that there was no evidence presented regarding why the families considered the couple to be a compatible match is reasonable because the evidence was not before the tribunal. The Respondent submits that it was not incumbent on the IAD to be persuaded that the mere sharing of a common nationality, language, and religion is sufficient evidence of compatibility for the purposes of finding a marriage genuine.

[61] The Respondent also submits that it is absurd to suggest the IAD did not engage with the available evidence; the evidence was considered but not persuasive. For example, the IAD had considered the evidence for the Applicant's trips to Montenegro, but found the trips were not

persuasive in light of the lack of knowledge the couple had regarding each other, in addition to other issues in the evidence. The IAD's alleged misapprehension regarding the date the Applicant left Montenegro is not a basis for judicial review, as the IAD did not base its Decision on this alleged error of fact. Additionally, the Applicant fails to address the other issues respecting the reliability of his testimony in regards to the dates of travel.

[62] The IAD did not fail to consider relevant evidence, nor did it make any plausibility findings or base its Decision on irrelevant and peripheral matters. The adverse inferences drawn from the vague testimony and inability to provide details or notable events were open to the tribunal in light of the testimony about the couple's frequent communications.

[63] Since there is no specific test established for determining the genuineness of a marriage, the IAD is exclusively entitled to determine the relative weight that should be given to the evidence. The IAD is also entitled to determine the plausibility and credibility of the evidence before it. There is no basis for interfering with the Decision because the conclusions and inferences drawn by the IAD were reasonably open to it on the record.

C. *Applicant's Reply*

(1) Primary Purpose of the Marriage

[64] In *Kaur*, above, the identified discrepancies were significant and irreconcilable and Justice Zinn held that the analysis was reasonable because the IAD explicitly relied on the discrepancies in the couple's testimony. In the present case, however, the IAD placed too much

emphasis on trivialities and relied on the couple's engaging in a truncated process to expedite reunification to Canada. The latter is an error because the sponsorship provisions of the Act have an objective of spousal reunification and that purpose would be defeated if the desire to reunite is evidence that a relationship is entered into for immigration purposes: *Tamber v Canada (Citizenship and Immigration)*, 2008 FC 951 at para 19 [*Tamber*].

[65] The IAD distorted the purpose and intent of the civil marriage ceremony. Canada was chosen as the country of reunification based on the Applicant's status as a refugee facing persecution in Albania; since the couple cannot return to Albania, they chose to have a truncated civil marriage ceremony without the traditional wedding celebration.

[66] The inference that Silvana would be interested in entering Canada to facilitate sponsorship for her family under the family class is not reasonably drawn; it is speculation and lacks evidentiary support. This finding is not justified, intelligible, nor does it fall within a range of accepted outcomes.

## (2) Cultural Insensitivity

[67] The IAD also found that inquiries regarding the blood feud were not made; however, there were no facts to support this finding. In fact, Silvana testified that she knew about the blood feud but did not ask for details. This is plausible in a patriarchal society where the husband serves as authority over his wife. The Applicant testified that he did not want to talk about death or tragedy, but the IAD dismissed this as "simply not believed." The Applicant submits that this is a speculative plausibility finding that cannot stand.



(3) Factors of Compatibility

[68] The Decision states “there is no evidence presented why their families considered this match to be compatible,” which is a clear demonstration that the IAD did not consider the compatibility factors. The IAD did not turn its mind to the evidence and therefore did not truly weigh the positive and negative evidence.

(4) Overreliance on Inconsistencies and Rejection of Reasonable Explanations

[69] The IAD relied on minor, often perceived inconsistencies and contradictions, in addition to problematic value judgments. As stated in *Tamber*, above, at paras 18-21, an emphasis on trivial inconsistencies without enough attention paid to the substantive evidence in support is an error. For example, the IAD dismissed the wedding celebration as being only for the purpose of the application based on an invented inconsistency, even though the Applicant testified that the couple initially did not want to hold the wedding celebration in Montenegro so as not to burden their family and friends with the inconvenience of travel; however, they ultimately conducted the wedding celebration in Montenegro due to the circumstances that arose after the sponsorship application was denied. Furthermore, the failure to address this explanation is a reviewable error: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17.

## VIII. ANALYSIS

[70] There were certainly some inconsistencies in the evidence of Silvana and the Applicant but the IAD has committed fundamental errors in this Decision that necessitate its return for reconsideration by a differently constituted IAD. Generally speaking, the problems with the Decision are not about the weighing of the evidence; the IAD either gets the facts wrong, overlooks a reasonable response, or simply ignores significant facts. I am in agreement with many of the points made by the Applicant and will set out the most important ones below.

### A. *Quick Process to Obtain Visa*

[71] The IAD found that because “the appellant testified that they married in a civil wedding thinking that it would be a quick process for the applicant to get a visa to Canada, I find that the primary purpose of this marriage was to facilitate the applicant’s entry to Canada.” The IAD then goes on to suggest that Silvana’s “entry to Canada could help facilitate her siblings’ eventual entry to Canada.” The clear implication is that the purpose of the civil wedding was to allow Silvana to gain quick access to Canada so that she could sponsor her siblings. There is no evidence to support this inference.

[72] The Applicant’s evidence was to the effect that, following the civil wedding ceremony, they waited for Silvana to come to Canada so that they could be together as man and wife.

[73] Because Silvana was denied entry to Canada, the Applicant has fully demonstrated that he intends to live with his wife because he had been making frequent trips to Montenegro, at

considerable expense so that they can be together as man and wife. He mentions the financial hardship this is causing but explains “But again, I’m happily married and something else is more important than everything else, and I will go on with this.”

[74] The fact of a civil marriage followed shortly by a sponsorship application does not support a conclusion that the marriage was entered into so that Silvana could come to Canada and sponsor her siblings. The evidence supports that Silvana wanted to come to Canada so that she could be with her husband and get on with family life.

[75] The record also shows that the IAD’s suspicions regarding Silvana’s motives for seeking to come to Canada were never put to her in any meaningful way. She was never given an opportunity to address this issue, which is procedurally unfair.

B. *Cultural Context – The Applicant’s Past Life*

[76] One of the central findings and conclusions of the IAD is as follows:

[11] The appellant came to Canada as a refugee in 2006. His refugee claim was based on a family feud with another family in the area over the right to fish in a certain area. Although the appellant testified this feud did not place his wife in any significant danger, the applicant’s lack of knowledge regarding his past is not indicative of a genuine marriage. It might be reasonable for the applicant not to ask questions about her husband’s past if it did not, in any way, affect her. However, it is simply not believable that she would not have asked about his past or her family would not have made inquiries given that the appellant’s fear of return to Albania is so great that he stays in Montenegro, rather than entering Albania. This couple are from the same region of Albania. The appellant testified that the border agents sometimes make it difficult to cross the Albania-Montenegro border, yet the applicant crossed that border frequently to visit her husband over the years.

Furthermore, the marriage was apparently celebrated in Montenegro with 300 guests from Albania. I must assume that the appellant has never visited the applicant's home because they did not know each other before December 2012. If this marriage were intended to last a lifetime, it only makes sense that the applicant would have asked why the appellant could not return to his home or visit her home in Albania. Even if their community is a patriarchal community where men make major decisions in the family, it is not reasonable that the applicant would not have been curious about his past or that the appellant would not have shared the circumstances of his life-altering decision to come to Canada. This information was likely not shared between them because the marriage is not genuine.

[77] The evidence is clear that Silvana did know that the Applicant had a difficult past that prevented him from returning to Albania but that, for cultural reasons, she did not push him on the details. In addition, there was simply no evidence before the IAD that Silvana's family have not asked about the Applicant's fear of return to Albania.

[78] During the interview with the visa officer of February 18, 2014, Silvana confirmed that the reason the Applicant came to Canada in 2006 was because "he had a dispute with another family and this is something he does not wish to talk about" and that the reasons she did not ask for more details is that "I never asked him because I understand he does not want to talk about this."

[79] During his testimony before the IAD, the Applicant confirmed that his wife understood why he could not go back to Albania because of the risks he faces there, but that she does not know the underlying reasons: "But we never... we never repeat the death stories."

[80] The Applicant was pressed on the issue of not telling his wife the full story but explained:

**MR. STATHAKOS:** Of course. And, does your wife understand this today? That there are risks for you to go back to Albania? And they are serious--

[**APPLICANT**]: Yes, yes.

**MR. STATHAKOS:**--and they could keep you from going there for a long time.

[**APPLICANT**]: Yes, yes.

**MR. STATHAKOS:** Does she know the underlying reasons, the problem that you had, that has caused you to be in this difficult situation? Have you discussed it with her?

[**APPLICANT**]: No.

**MR. STATHAKOS:** Have the families discussed it?

[**APPLICANT**]: Well, I'm not sure if she talks with my mom or my parents or anybody like that? But we never...we never repeat the death stories, so we didn't.

**MR. STATHAKOS:** Did she never enquire and say, you know, what happened? Why? Why can't you come back to Albania, what's the problem?

[**APPLICANT**]: Well, like I said, she didn't ask.

**MR. STATHAKOS:** Did you tell her?

[**APPLICANT**]: No.

**MR. STATHAKOS:** Do you not find that odd, because that issue has caused you a lot of money and a lot of effort to trying meet, marry your wife, and that hasn't been a main topic of discussion, isn't that odd?

[**APPLICANT**]: Yes. Well, she never asked. I never told. I'm telling you that maybe she talked with my family about that, I never told her, she never asked. I know her father...I know he had an accident, (indiscernible), I know that, but I never asked her, and she never told me how, so, it's kind of the same. I was...I didn't ask her how, and she didn't told me – She didn't... we left it at that maybe she knows the story, and I'm assuming she does, but we never brought that all over again. That was a tragedy for me and for my family. I don't know if she's comfortable asking me, or me telling her.

[emphasis added]

[81] In the context of a patriarchal society where marriages are arranged and women are totally subordinate to men, there is nothing unreasonable at all about Silvana not questioning the Applicant on the details of the blood feud that caused him to come to Canada as a refugee, and which prevents his return to Albania. The IAD shows no appreciation of this cultural context and assesses this issue through Western eyes. The IAD is also unreasonable to say that Silvana is not curious about the Applicant's past. She explained to the visa officer that she knows about his dispute with another family but "he does not want to talk about this." At the hearing before the IAD, Silvana explained that:

They do have problems with another family. I have not asked about details. These are not things for a woman to know. There are things that are solved by men only. The men only solve them, men only.

[emphasis added]

The IAD has no grounds for its conclusions that "This information was likely not shared between them because the marriage is not genuine."

C. *Consummation and the Religious Wedding*

[82] On this issue, the IAD finds as follows:

[13] The appellant testified that they did not live as a married couple after the civil registration of their marriage in July 2013 because they are both Catholic and you must wait until the religious ceremony to live as husband and wife. He also testified that they had to invite all the people to Montenegro and they did not want to do that because it was difficult for older people. The appellant also thought it would be quick to get a visa and do the

marriage in Canada. Yet there was no evidence presented that they had a wedding in a Catholic church or with a priest of any kind at any time even though they apparently consummated the marriage and lived as husband and wife in 2014. They presented no document that shows they had a religious ceremony and the photographs only depict a party with family and friends. The appellant was asked in cross-examination if there was a religious ceremony. He testified that they are Orthodox in Montenegro and he looked for a church (I assume he meant Catholic church), but could not find one. When he was asked if they discussed having a Catholic ceremony, he testified that it never came to his mind to do so. The appellant's testimony was inconsistent to a point that it made little sense. Incidentally, the photographs also depict some elderly people at their celebration in Montenegro in 2014, yet there was no evidence that it caused them any difficulty to travel there and attend a celebration after the refusal of the application. I find that this couple celebrated a marriage in 2014, only for the purpose of the sponsorship application and to address some of the concerns of the visa officer. However, the evidence of the celebration of the marriage in 2014 did not adequately address their intention at the time of their marriage in 2013.

[83] The IAD appears to have misunderstood the evidence on this issue and, once again, it looks at the issue through Western eyes. In other words, culturally speaking, the evidence was that, as far as consummation is concerned, it is the big celebration that counts and not the religious ceremony. This point was specifically clarified in the evidence and confirmed by the Applicant. The IAD completely overlooks this clarification.

[84] IAD's counsel understood this and clarified it for the IAD:

**BY MR. STATHAKOS:**

Q And if I may, I think what Leksi has said is the way he sees things, having the big ceremony, is equivalent to the family's traditionally understanding that your [*sic*] hitched for good?

[APPLICANT] Yeah.

Q And now you can start sleeping together as man and wife?

**PRESIDING MEMBER:** Is that correct?

[**APPLICANT**] That is correct. Yes.

[85] In concluding that “this couple celebrated a marriage in 2014, only for the purpose of the sponsorship application and to address some of the concerns of the visa office,” the IAD entirely overlooks the explanation provided by the Applicant for the celebration:

**MR. HARSANYI:** And, then, you put in a sponsorship application sometime after that, right?

[**APPLICANT**]: Yes. That came on September, I think. You came up with that on September.

**MR. HARSANYI:** Okay. Alright. So, sponsorship was put in, in September.

[**APPLICANT**]: Roughly, I’m not sure.

**MR. HARSANYI:** Okay. At some point. It was put in right? In that fall?

[**APPLICANT**]: Yes.

**MR. HARSANYI:** Okay. And, did the sponsorship go smoothly? The application.

[**APPLICANT**]: Not the way I was expecting. No.

**MR. HARSANYI:** Okay. What happened? They were asking for lots of information?

[**APPLICANT**]: Yes.

**MR. HARSANYI:** They were asking for information about whether you were traveling back and forward to Albania?

[**APPLICANT**]: Yes.

**MR. HARSANYI:** And, they wanted proof--

**PRESIDING MEMBER:** He’s testifying ...not you (laugh).

**MR. HARSANYI:** You are right, madam, sorry. Sorry. I just thought because it was in the record.



**PRESIDING MEMBER:** It is. So, I don't even know ...I have read that, so-

**MR. HARSANYI:** Okay. I'm just trying to, as you said, paint the picture, what was happening and why was taking longer than normal. That's all. Normally, in court (indiscernible) ID. It's not sort of non-contentious issues, the court gives quite a bit of a latitude, on leading questions when its issues that aren't really in dispute.

**PRESIDING MEMBER:** Well, I don't know if it is, but there is cross-examination too (indiscernible)

**MR. HARSANYI:** Yes, okay. So, it was taking a lot longer...was it taking longer than you expected?

[**APPLICANT**]: Yes. They were asking for a thing and I put ...I sent the thing and I was waiting for another month or two and they were asking for something else. And I believe it's been on and on to the point that I was...to the point that her family, like...they were saying, like, finally our daughter needs to get married and go to some...you know, to your house ...do something, because there were cases that people got married and the girl ends up staying there for seven, eight years, five years. And they still have the daughter there, right?

**MR. HARSANYI:** So was she living with her family during this time?

[**APPLICANT**]: Yes.

**MR. HARSANYI:** I see. So were you getting pressure from her family?

[**APPLICANT**]: Yes.

**MR. HARSANYI:** Because the process was taking a long time?

[**APPLICANT**]: Yes. Not big pressure I cannot say big pressure, but I know, I heard that her grandfather said that, well, I don't like to keep her here long. I want things to...you know...straight things up.

**MR. HARSANYI:** He wasn't happy with the way it was.

[86] The Applicant clearly explains that the celebration took place when it did because he felt there was family pressure for Silvana to be married and the sponsorship application was taking a long time. The IAD does not explain why this plausible response was not acceptable.

D. *Focussing on What Documents Do Not Say*

[87] The IAD also commits an error that this Court has warned against on many occasions. The IAD examines declarations and letters from friends and family members about the couple's marriage and then concludes:

[14] The appellant provided declarations from his parents, his brother, and friends indicating that the appellant and applicant were married on July 21, 2014, but they failed to even mention the civil marriage in July 2013, which further calls into question their intentions at the time of their civil marriage.

[footnotes omitted]

[88] The Applicant's evidence before the IAD was that it is the wedding celebration that really marks the conclusion of a marriage in the culture of this couple, even though a civil wedding ceremony is undertaken.

[89] The IAD's failure to appreciate this cultural point leads it to draw a negative inference from the failure of friends and family to mention the civil wedding ceremony of July 2013, and to ignore what this documentation says in order to rely upon what it does not say. This is a reviewable error. See, for example, *Mahmud*, above, at paras 11-12 and *Sitnikova v Canada (Citizenship and Immigration)*, 2016 FC 464 at paras 22-23.

E. *Evidence of Compatibility*

[90] The IAD found inconsistencies and vagueness in some of the details of meetings and who was present, the names of hotels, and places where they stayed, travel times, and how often the Applicant sends money to Silvana, which can obviously be important indicia of the genuineness of a relationship. But the IAD appears to ignore the more compelling evidence of genuineness. And this is not just a question of weight. For example, when it comes to the issue of compatibility, the IAD finds that “There was no evidence presented why their families [sic] considered this match to be compatible.”

[91] Compatibility is an extremely important issue in considering whether a marriage is genuine. Yet the IAD overlooked the evidence that was presented that this was a marriage arranged by both families for a couple from the same area of Albania and the same culture who had not been married before. The IAD also overlooked the large wedding reception that was held in Montenegro and that was attended by over 300 guests and that the relationship has been ongoing for four years and that the Applicant, notwithstanding the denial of the sponsorship application, has refused to live apart from his wife and makes frequent trips to Montenegro where she lives with his family (which is culturally appropriate for a married couple) at considerable expense so that he can have a real married life. This couple continues extensive contact and communication and the Applicant provides financial support. This is all evidence of compatibility within a genuine marriage. The IAD fails to mention what other possible areas of compatibility are missing.

[92] The inconsistencies relied upon to find that the marriage is not genuine are relatively minor when it comes to assessing genuineness. For example, the Applicant could not recall where he stayed when they consummated the marriage and the couple couldn't provide examples from their conversations of events that were notable, or that demonstrated a difference of opinion. There were other inconsistencies but they don't add up to much when compared with the predominant evidence of genuineness. I am not here re-weighting evidence. I am saying that the IAD simply ignored evidence of compatibility when it concluded that "there was *no* evidence presented regarding why the families considered this match to be compatible." There are also errors in some of the inconsistencies referred to by the IAD. For example, the IAD says that the Applicant stayed in Montenegro for a month after the July 2013 wedding ceremony but the Applicant clearly testified that the wedding ceremony took place one month after he arrived in Montenegro. See Transcript, May 2016, lines 753-761.

F. *Failure to Understand Explanations*

[93] The IAD makes the following finding but fails to address or understand the explanations that were given when the issues were put to the Applicant:

[12] The families did not attend their civil marriage in July 2013, which is very odd given that this is the first marriage for both the appellant and applicant. Furthermore, the applicant is the oldest child of four children in her family and one would think that her family would want to participate in such an important event. It made little sense to the visa officer and it was not adequately explained at the hearing why the applicant stated in her interview that the families were busy and could not attend the marriage. The applicant wrote in her application, "Leksi would like to organize a celebration once we are together in Canada." They also testified that it was their intention to celebrate the marriage in Canada. This is odd, given that both sets of parents and their siblings reside in Albania, it is difficult to obtain a visa and it is expensive to fly to

Canada for a celebration that could be held close to their homes in Albania. If they truly intended to celebrate their marriage in Canada, then it would have heightened the significance of their civil marriage, calling into question why their families did not attend the marriage in July 2013.

[footnote omitted]

[94] The Applicant provided the following explanation:

[**APPLICANT**]: Okay. Okay. I don't know. I don't think it was easy for older people to go across the border. I don't think it was easy for people, that they come to my (indiscernible) that not very close to me and I don't want to -- I didn't want anybody to say, "Oh, we have to go (indiscernible)." Or somebody who can go (indiscernible).

**BY MR. STATHAKOS:**

Q: And then why would it -- why would that have been difficult or unacceptable, as opposed to having the ceremony in Canada when I would assume very few, if any of these people could come and celebrate --

[**APPLICANT**]: Yeah.

Q: -- your wedding.

[**APPLICANT**]: Yeah. But I know if I can say to somebody back home, "Come to Canada to my wedding," and somebody can't -- like it's -- It's going to be like I'm joking them to say some here because they can't. Right? But if I do a celebration like I did, in Montenegro, I have to invite them and they have to come. Even -- even they don't want to because if they don't come, I would say, "Well, you didn't come to my wedding. What's -- what's wrong with that?" And they cannot say, "Oh, well, it was too far. Well, it was too old. Well, it was too -- stuff like that.

Q: They're obligated -- more obligated to come? Because it's close.

[**APPLICANT**]: That's -- that's my opinion. That's my -- always me parents' opinion. That's --

[95] In other words, the Applicant initially wanted to give family members an opportunity not to have to travel to a celebration in Montenegro and so decided that coming to Canada would be a good opportunity to do this. There would be no hard feelings if someone couldn't come to Canada. When this became impossible, the celebration was held in Montenegro and, confirming the Applicant's instincts, over 300 people felt compelled to attend and make the journey. The IAD seems not to have understood this crucial point and completely overlooks the Applicant's explanation in its reasons.

G. *Having Children*

[96] The IAD once again either overlooks or fails to understand significant, unquestioned testimony in relation to the couple's plans for having children:

[19] The witnesses provided little evidence of their plans for the future. Although the appellant testified that they spoke about having children early on in their relationship, he also testified that it was his decision that the applicant would not try to get pregnant while remaining in Albania because it would be difficult to have a child while she is living with his family. Later on in his testimony, he stated that they have never used any birth control and he would be happy if the applicant gets pregnant. Other than this inconsistent testimony, they provided few concrete plans for the future. This is not indicative of a genuine marriage.

[97] When the Applicant's testimony on this issue is examined, there is clearly no inconsistency at all:

**PRESIDING MEMBER:** Did you use any form of birth control?

[**APPLICANT**]: No. I didn't. I talked to her. "Sylvana" [*sic*], I said. We talked to her. If it happens, it happens. Like if it happens, we welcome anything that happens.

**PRESIDING MEMBER:** Okay.

[**APPLICANT**]: I'm not -- I don't like to have kids and you being here and it's going to be harder for you. And for me. I have a wife and I'm here and I don't want to have a child there and I'm here, too.

**MR. STATHAKOS**: Thank you. These are all my questions.

**PRESIDING MEMBER**: I'm going to -- I need to explore this a little bit. Okay. But -- because I didn't hear what you said. Did he say that -- that he's too cheap? I don't know.

**MR. STATHAKOS**: To spend money. But I understand that to mean to spend money on children.

[**APPLICANT**]: To spend money on children?

**PRESIDING MEMBER**: No, no, no. I don't understand --

**MR. STATHAKOS**: Not on birth control.

**PRESIDING MEMBER**: -- why you're not using any form of birth control.

[**APPLICANT**]: Well, why should I use any form of birth control?

**PRESIDING MEMBER**: Because you made the point of saying it's not the time. I'm not in a position to have a child.

[**APPLICANT**]: No.

**PRESIDING MEMBER**: So do you have sex with your wife?

[**APPLICANT**]: Yes, I do.

**PRESIDING MEMBER**: Okay. So is there a risk of her getting pregnant?

[**APPLICANT**]: It's not the end of the world. It's not something --

**PRESIDING MEMBER**: Nobody said it's the end of the world. I'm asking you is there a risk of your wife having -- or getting pregnant when you --

[**APPLICANT**]: Yes, it is.

**PRESIDING MEMBER**: -- have sex with her.

[**APPLICANT**]: Yes, it is.

**PRESIDING MEMBER:** Okay. So you have -- you have sperm that in fact, that she could, in fact, get pregnant?

[**APPLICANT**]: Yes.

**PRESIDING MEMBER:** Okay. But you're not in a position to have a child? Is there a reason why you wouldn't use some form of birth control?

[**APPLICANT**]: That never crossed my mind to do that. That never crossed us --

**PRESIDING MEMBER:** But it crossed your mind not to have any children but it didn't cross your mind to use birth control?

[**APPLICANT**]: Not to be (indiscernible) for it. Not to have children. I would like to wait, if it's -- you know, if it's something happened, it will happen and I'm -- I'm happy if it's happened. I'm happy if that happens. I'm not -- I won't say, "Whoa, what -- what did we do?" I wouldn't do that. I'm just saying I'm not comfortable for her to have -- for us to have kids and she is still there; I'm still here. It's not the thing that we --

**PRESIDING MEMBER:** So there's no reason why you haven't used birth control?

[**APPLICANT**]: No. It's -- it's --

**PRESIDING MEMBER:** There's no reason at all. It's not because you're cheap, like I thought that you said.

[**APPLICANT**]: No. I'm -- I'm really sorry that I said that. I should have never said that. I -- I was just something, why should I use birth control with my wife. Like why should I do that? It's not that if she has -- if a kid comes along, like I welcome that. I will like that. But I don't want that to happen right now. Like if you ask me if it was in my hand, I would say I will wait till some -- this thing gets resolved.

**PRESIDING MEMBER:** I totally get that. So I don't understand why you wouldn't use condoms or you wouldn't use the withdrawal method or some other form of birth control, if it is an issue for you or you're not in a position to have a child --

[**APPLICANT**]: But this was --



**PRESIDING MEMBER:** -- because things are bigger -- and I don't want to make them bigger than what they already are, is what your words were.

[**APPLICANT**]: I think I said that, maybe I make it more than it was. I'm just saying again I don't want to have kids before I get her here or I get with her to some point that we know our -- like our life is together. But if a kid happens, I'm not worried. I'm really happy if that happen. But I'm not trying to get her pregnant. I think that's what you guys asked. I'm not trying to get her pregnant.

[emphasis added]

[98] This is not inconsistent testimony.

#### H. *Speaking on the Telephone*

[99] The IAD felt that the Applicant has not provided more details about telephone conversations:

[16] The appellant's testimony was vague. He could not recall where he stayed with the applicant after the celebration of their marriage in July 2014 when they apparently consummated the marriage. In cross-examination, the appellant was asked and given plenty of opportunity to provide evidence of their shared life together, specifically if there was any event that was notable, funny, or demonstrated a difference in their opinions. He provided nothing specific. The appellant testified that he has two close friends in Canada, but could not recall if one of his friends met his wife when that friend visited his family in Albania. The appellant testified that the applicant visits her family every three months; yet the applicant testified that she visits her family every month. To put this into perspective, this couple testified that they speak to each other by telephone or other electronic means every day or two, often for lengthy periods of time. There was no explanation why the appellant could not have provided some detail about the information they share with each other, as one would expect in a genuine marriage.

[emphasis added]

[100] It is simply not accurate for the IAD to say that the Applicant “provided nothing specific.” The Applicant testified as follows:

**PRESIDING MEMBER:** Was there something in the last few weeks that’s been notable in your mind that you can recall having a conversation about? Did somebody just recently get engaged or married? Did somebody just recently die in -- in --

[**APPLICANT**]: Yeah. Her -- her cousin.

**PRESIDING MEMBER:** -- you know, in the area or what’s happened?

[**APPLICANT**]: Her cousin got engaged.

**PRESIDING MEMBER:** Her cousin got engaged. Is this a man or a woman?

[**APPLICANT**]: Man.

**PRESIDING MEMBER:** And who did he -- did he get engaged to somebody in the area?

[**APPLICANT**]: Yeah. Yeah.

**PRESIDING MEMBER:** Okay. Just tell me a little bit about it. Tell me what she told you.

[**APPLICANT**]: Okay. She got engaged to a girl that they were -- they know each other for -- you know, for a long time. Not a long time. I don't know. She -- the girl, she used to live in the States and they were on -- like they were talking about getting engaged and like the guy asked her father to go -- like I asked -- we asked Sander Marco to go and ask for her hand because they know each other. He went there. They asked. They come back with a positive -- like positive. They agreed. They're engaged. She lives in the States. She's trying to bring him over now, somehow. But you know, sponsor him.

[101] Once again, the IAD simply ignores evidence that contradicts its own conclusions.

[102] In summing up, the IAD makes the following assessment:

[21] There are some positive factors that were presented and I have taken into consideration, for example, the number of times the appellant has returned to Montenegro since the marriage and the purchase of an engagement ring. However, these factors are not sufficient to overcome the concerns of the visa officer. If anything, their testimony confirmed that this marriage is not genuine. It simply is not sufficient for a couple to do those things after the refusal that the visa officer held to be the reasons he found the marriage not to be genuine. I acknowledge that people in genuine marriages do some things only to show that the marriage is genuine. For example, the IAD is often presented with greeting cards written in a language not familiar to the parties in a marriage but exchanged only for the sake of the application. Significant weight is not generally assigned to that kind of evidence, but nor does it detract from a genuine marriage. This is not one of those cases. Despite the appellant's return trips and the engagement ring he bought, I have considered the lack of evidence of knowledge of each other in this case. Their testimony was not consistent regarding the development of their relationship. There was no evidence presented regarding why their families considered this match to be compatible and little reasonable explanation why the applicant learned only one month prior to her June testimony about the appellant's past and the reason he is unable to return- to his home in Albania. I was also struck by the lack of plans for their future. Given that the appellant testified that they married in a civil wedding thinking that it would be a quick process for the applicant to get a visa to Canada, I find that the primary purpose of the marriage was to facilitate the applicant's entry to Canada. I acknowledge that she only has cousins in Canada; however, she is the oldest child of four children in her family and her entry to Canada could help to facilitate her siblings' eventual entry to Canada.

[103] There was, in fact, significant evidence as to why both families found the match compatible and why they went about arranging a marriage for this very reason. For example, the Applicant testified as follows:

**BY MR. HARSANYI:**

Q: Okay. So why don't you describe for us, briefly, how this arrangement took place?

A: Well, my -- my parents are looking to find me a wife for me and they look different places and they -- they came to their mind like Sander Marco knows somebody that she could fit my -- you know, my -- my personality and my -- or her family, like they said the good things about that -- for that family. And my family looked into that. The Sander Marco suggests.

Q: Okay. And then what happened?

A: And then they send me -- my -- my parents, they still ask for that family. They did ask more. And they came to the conclusion that they liked that family. And they send me a picture of my wife.

Q: Okay.

A: And I accepted that.

Q: Okay. When was this -- when did this sort of conversation take place?

A: In 2012.

[104] Silvana also testified as follows:

**BY MR. HARSANYI:**

Q: When did your -- it's a tricky question. How -- when did you realize that -- when did your family agree to have Leksi as your husband?

[SILVANA]: The little time -- sometime after my father spoke with the father of Leksi. Then my father made some inquiries about Leksi. My father made some inquiries about Leksi. And then afterward (indiscernible), they agreed for us to get engaged without -- without -- yeah. So they agreed for both of us to -- to get engaged, taking into consideration if we liked each other or not. Taking first into consideration that we liked each other.

Q: So when you say "they agreed for us to get engaged", are you referring to your dad and his dad?

[SILVANA]: Yes. Yes. They agreed (indiscernible). Yeah. They agreed with his family so they agreed for that we are, taking into consideration we both liked each other, as well.

[105] The evidence is clear that the respective families made the usual inquiries to ascertain that there was compatibility before going ahead with the marriage.

I. *Conclusions*

[106] There are other problems with the Decision but there is no point in listing them all. Based upon the above, it is obvious that the Decision is unreasonable and must be returned for reconsideration.

[107] One of the strangest things about this Decision is that, in his final submissions at the IAD hearing, IAD's counsel advised the IAD as follows:

**MR. STATHAKOS:**

...I would start off by saying that I would agree with counsel that comparing this to many cases that we see -- marital, spousal refusal cases that we see before the IAD, that this case does present some strong and good evidence of a genuine marriage between Leksi and Silvana.

(Certified Tribunal Record, p 200, lines 35-40, emphasis added)

[108] I couldn't agree more. But reading the Decision, you would never know it. It looks as though the IAD paid as little attention to IAD's counsel as it did to the evidence before it. This inattention has cost the couple dearly. Great care should be taken to ensure that they don't have to suffer further hardship for no real reason.

IX. Certification

[109] Counsel agree that there is no question for certification and the Court agrees.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that**

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted IAD.
2. There is no question or certification.

“James Russell”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3558-16

**STYLE OF CAUSE:** LEKSI GJOKA v THE MINISTER OF IMMIGRATION,  
REFUGEES AND CITIZENSHIP CANADA

**PLACE OF HEARING:** CALGARY, ALBERTA

**DATE OF HEARING:** JANUARY 25, 2017

**JUDGMENT AND REASONS:** RUSSELL J.

**DATED:** APRIL 21, 2017

**APPEARANCES:**

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