

Federal Court



Cour fédérale

Date: 20200327

Docket: IMM-4607-19

Citation: 2020 FC 432

Ottawa, Ontario, March 27, 2020

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

BE VAN NGUYEN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] These reasons explain why I informed the parties following oral submissions that this application to review a decision of the Immigration Appeal Division [IAD] would be allowed.

[2] Mr. Nguyen was born in Vietnam. He lives in Surrey, British Columbia and works in construction. He left Vietnam after his compulsory military service, and arrived as a refugee in British Hong Kong in 1983. He married his first wife in April 1986, and they had three children

who are now adult Canadian citizens. Mr. Nguyen and his first wife were granted permanent residence in Canada in July 1986, and he became a Canadian citizen around 1990. Mr. Nguyen and his wife divorced in 2000. They then resumed living together before their final separation in 2006.

[3] Mr. Nguyen first met his current wife Ms. Bui when she cut his hair in June 2003 when he was visiting relatives in Vietnam. She was born in Vietnam in 1976 and has not previously been married. Mr. Nguyen returned to her for haircuts during his annual visits from 2004 to 2006. In 2007 he they began a friendship and travelled to Hanoi together. Over the next two years, he and Ms. Bui stayed in touch and he visited her each time he was in Vietnam. In September 2009, they held an engagement ceremony at Ms. Bui's home, and were married on September 18, 2009.

[4] Ms. Bui's application for a permanent resident visa was refused by a Canadian visa officer in 2010 on the basis their marriage was not genuine. The IAD dismissed an appeal in 2012.

[5] Mr. Nguyen continued to visit Ms. Bui in Vietnam, travelling there approximately 15 times. They had a son in 2013 and a daughter in 2017. Mr. Nguyen's first visit to see his son was when the child was 18 months old.

[6] Ms. Bui reapplied for a permanent resident visa in 2016 and again the visa officer found the marriage was not genuine. Mr. Nguyen appealed to the IAD, which found its earlier decision did not prevent the case from proceeding.

[7] The IAD held an oral hearing on September 13, 2018, and April 30, 2019. An interpreter assisted at both sessions. Mr. Nguyen attended in person and Ms. Bui participated by telephone.

[8] The first session ended when Mr. Nguyen seemed unable to give directly responsive answers to questions from counsel for the Respondent, who opposed the appeal. The IAD agreed with a request from counsel for the Respondent to exclude Mr. Nguyen while the Panel and counsel discussed how to proceed.

[9] At the conclusion of the first hearing day, the IAD requested an assessment of Mr. Nguyen to assist in determining whether to appoint a designated representative for him under subsection 167(2) of the *Immigration and Refugee Protection Act*, SC 2001 c 27. The IAD was satisfied at the second session that he did not need a designated representative.

[10] The IAD found that the marriage was not genuine and that Ms. Bui accordingly did not have the status of a spouse pursuant to subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/227-227. It applied criteria for assessing genuineness of a marriage from one of its previous decisions: *Chavez v Canada (Minister of Citizenship and Immigration)*, IAD TA3-24409 (2005) [*Chavez*]. The *Chavez* criteria the IAD applied in this

case were “development of the relationship, knowledge of each other, and ongoing communication.”

[11] The IAD found that Mr. Nguyen and Ms. Bui did not consistently describe the beginning and early stages of their relationship, and that the development of the relationship to the point of the marriage proposal was not adequately explained, especially since they were 15 years apart in age and had different marital histories. It found that their knowledge of each other was not consistent with a genuine marriage, noting contradictions between their oral evidence, including the particulars of the first IAD appeal, their daughter’s stage of development, Ms. Bui’s life in Vietnam, and Mr. Nguyen’s absence for the first 18 months of their son’s life.

[12] In my view, the assessment of the IAD in each of the areas it explored lacks reasonableness, transparency, and intelligibility.

[13] The Panel first considered the genesis and development of the relationship, stating:

[12] I consider the genesis of a relationship to be a significant and key area in appeals of this nature. In assessing the credibility of the evidence in this area, it is necessary to consider the witnesses’ ability to articulate in a reasonably consistent manner the circumstances of their introduction and their joint activities in the early stages of a relationship. However, there were several gaps in the testimony about how the relationship developed and led up to a marriage.

[13] The Applicant is a hair dresser and sometime in 2003, provided hairdressing services to the Appellant who happened to be visiting Vietnam from Canada. The Appellant was married to his first wife at the time he met the Applicant, but in September 2009 after he made contact with her he proposed marriage. There is insufficient evidence before me to corroborate this narrative or to demonstrate why or how the relationship developed to the point that a marriage between them was decided.

[14] There are incompatibilities of age and marital history between the couple and I find the Appellant and the Applicant are not credible in explaining the circumstances of how the relationship developed and led up to a marriage. These significant gaps in the evidence on how the relationship started and developed into a marriage was not resolved or credibly explained by the hearing's end and remained a significant concern for me.

[14] There are several issues with this reasoning. First, the IAD is wrong in stating that when Mr. Nguyen met Ms. Bui, he was married. The evidence is that he and his first wife were divorced. They divorced some three years before in 2000. They reconciled and continued to live together until 2006. The evidence is thus far different than, as suggested by the Panel, a married man with no apparent marital challenges meeting a woman who he then married.

[15] Moreover, the Panel ignores the evidence that Mr. Nguyen returned to her for haircuts during his annual visits in 2003, 2004, 2005, 2006, and 2007. The Panel also fails to reference the evidence that in 2007 (after the final separation of Mr. Nguyen and his first wife, they began a friendship and travelled to Hanoi together. Nor does the Panel reference the evidence that over the next two years, he and Ms. Bui stayed in touch and he visited her each time he was in Vietnam.

[16] The Panel's statement that there "are incompatibilities of age and marital history between the couple" is a fact – but one that is entirely irrelevant. The world is full of genuine marriages between persons with different marital histories and ages. Those are not "incompatibilities" as found by the IAD; they are facts.

[17] It is also of concern that the IAD fails to explain at all how it is that “the genesis of a relationship” is a “significant and key area” in this particular appeal. This is not a case where the marriage is one of recent origin after recently meeting, suggesting that the motivation may have more to do with immigration purposes. This is a marriage of ten years, after knowing each other for six years, and with two children born of that marriage. In my view, it is unreasonable to give much if any weight to the genesis of that long-lasting relationship given its length and its results.

[18] In addition to the birth of two children, the evidence before the IAD was that Mr. Nguyen visited Ms. Bui 15 times in Vietnam since their marriage, and made numerous payments to her in that period. Neither fact is noted by the IAD. A genuine marriage is a culturally recognized union between people who wish to be together, support each other emotionally and financially, and often to have children. This ignored evidence strongly supports the claim that this is a genuine marriage.

[19] The IAD also found that the evidence of the couple going to their knowledge of each other “was not as detailed as would be expected in a genuine relationship.” The Panel lists nine areas of “inconsistent testimony” in this category. Counsel for Mr. Nguyen addressed each in his memorandum. I agree with him that most are not an inconsistency in their evidence or are otherwise explained. In my view, in the face of a ten-year marriage and two children it is an error to base a decision on the relationship on minor matters such as whether a child is able to address the father as “Dad” or “Daddy”.

[20] I find particularly troubling the Panel's observation that their evidence differed on the number of bedrooms in her house in Vietnam. She said there were four, and he said there were three. They both agreed that in addition to Ms. Bui and the children, there were two others living there. Her evidence accounted for the occupants of all of the three bedrooms she said were in the house. His evidence was that in addition to the two in their own bedrooms, when he visited he slept with his wife in her bedroom with her and the children. If he truly meant that there were four bedrooms, and not, as I suspect four beds, one has to conclude that there was a vacant bedroom, and that possibility was not ever mentioned by any witness.

[21] The IAD was also concerned that Mr. Nguyen did not return to Vietnam to see his newborn son for some 18 months. He testified that he spent this time trying to track down the man who had assisted with the first visa application and who had all of his materials that were necessary to make a new application. The Panel makes much of the fact that Mr. Nguyen refers to this man as a "lawyer" when he was not. Many lay people refer to those who represent them as "lawyers" when they are not. Again, I find the Panel is taking a microscopic view of the evidence. I further find, contrary to the Panel, that it is not unreasonable that Mr. Nguyen would focus his limited time and resources to obtaining the materials necessary to make a new visa application for his wife and expanded family, rather than visit Vietnam.

[22] These are the main reasons I find the decision is unreasonable and cannot stand.

[23] In addition to the submission based on the unreasonableness of the decision, it was submitted that there is a perception of bias on the part of the person making the decision for the

IAD. Evidence was filed that this person allowed two out of 21 appeals under Section 28 of the Act, and three out of 35 appeals under Section 4 of the Regulations. While these numbers suggest there may be merit to counsel's plea that there was nothing that could have been said that would have resulted in this Panel accepting the appeal, I am unable to draw that conclusion. It cannot be drawn without more evidence as to the average number of appeals allowed, and the circumstances of the various cases.

[24] On a separate issue, I agree with the observation of his counsel at this hearing that excluding Mr. Nguyen from his hearing towards the end of his first day of testimony, even for the reasons indicated, was inappropriate. A party to a proceeding is entitled to be present during the entirety of a process unless his attendance is a danger to others. That was not the case here.

[25] Neither party proposed a question to be certified.

JUDGMENT IN IMM-4607-19

THIS COURT'S JUDGMENT is that the decision of the Immigration Appeal Division as to the genuineness of the marriage is set aside and the appeal is remitted to a different decision-maker.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4607-19

STYLE OF CAUSE: BE VAN NGUYEN v THE MINISTER OF
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