Federal Court  Cour fédérale

Date: 20200826

Docket: IMM-1775-19

Citation: 2020 FC 859

[ENGLISH TRANSLATION]

Ottawa, Ontario, August 26, 2020

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

STACY THEODORE

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The respondent, Stacy Theodore, is a Canadian citizen of Haitian origin. Approximately one year after becoming a Canadian citizen, the respondent traveled to Haiti and met her future husband, Jean Robert Guillaume [Mr. Guillaume]. The couple married on February 25, 2012.

[2] While still residing in Haiti in 2013, Mr. Guillaume submitted an application for permanent residence in the family class. He was sponsored by the respondent. The application was refused by a visa officer [Officer] in 2015, as she found that the respondent's marriage to Mr. Guillaume was not genuine and was entered into primarily for the purposes of acquiring a status or privilege under the *Immigration and Refugee Protection Act*, SC 2001 c 27, which is prohibited by subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations].

[3] The Immigration Appeal Division [IAD] heard the respondent's appeal of the visa officer's decision and overturned that decision in February 2019. The applicant, the Minister of Citizenship and Immigration [Minister], is asking that the IAD decision be set aside.

II. Facts

[4] The respondent entered Canada in 1994 and was granted permanent resident status in November 2000. In 2005, she filed a family class sponsorship application for Ralph Theodore, a child she claimed was her biological son. Since the respondent did not have a valid identity documents for the child, she eventually admitted that he was her adopted son.

[5] Following the 2010 earthquake in Haiti, the respondent travelled to her home country to assist in the rebuilding efforts. She met Mr. Guillaume there, and their relationship began when members of his family, who live in Quebec, learned of the respondent's trip and asked her to take certain items to Mr. Guillaume.

[6] After she returned to Canada, the respondent and Mr. Guillaume remained in contact. The couple became engaged on December 31, 2011, and married a few months later, in February 2012. In August 2013, the respondent began the process of sponsoring Mr. Guillaume.

[7] The Officer was not satisfied that the relationship between the respondent and Mr. Guillaume was genuine, given that during his interview, Mr. Guillaume was unable to describe the development of their relationship. She was also critical of the fact that Mr. Guillaume was unable to discuss the respondent's life in Canada or identify her hobbies or even her job. Finally, the Officer found that the absence of documentary evidence provided by Mr. Guillaume and the respondent to demonstrate that they had regular communication was to their disadvantage.

[8] The following is an excerpt from the Officer's notes in the Global Case Management System, in which she provides her reasons for refusing the application:

> [TRANSLATION]
>
> Based on the totality of the information in this application, I am not satisfied that this is a bona fide relationship under subsection 4. In the interview, the POI's answers were vague and missing specific details. He was unable to describe the development of the relationship except for their first trip to Léogane, or the conversations that he had with his sponsor, or their dates; yet, it is reasonable to believe that a man who has been in a relationship with a woman since 2010 would be able to describe at least a few moments of their relationship after their initial meeting. It is also reasonable to believe that the POI would know a little about the respondent's life in Canada, and that he would be able to identify the things she likes to do, her work, and the time she spends with her family. In addition, the POI has almost no documentary evidence to support what he says about regular communication; I have taken his explanation regarding Digicel into account, but this does not explain why the respondent is unable to provide anything. I have also considered the explanation regarding the computer and

> photos, but I am not satisfied that this explanation allows me to accept that the couple actually went out a lot and took a lot of photos. This application is refused.

III. IAD's decision

[9] Unlike the Officer, the IAD found that the marriage was genuine and not intended to provide Mr. Guillaume with any status or privilege under the Act.

[10] The IAD first criticized the Officer for not interviewing Mr. Guillaume in Creole, even though the latter had requested that his interview be conducted in Creole. Given that the Officer failed to use a Creole interpreter, the IAD found that she should not have criticized Mr. Guillaume for not answering her questions in sufficient detail, in a language in which he was not comfortable.

[11] That being said, the IAD did not lay the blame solely with the Officer, but also with the way the questions on the form are worded, as well as with Mr. Guillaume, who could have made the Officer aware of his discomfort. Given the entire situation, the IAD granted "much greater weight to the hearing than to the interview," given that an interpreter was present at the hearing.

[12] The IAD also found that the respondent and Mr. Guillaume are compatible, being both Haitians who share a common language and religion and have acquaintances in common. It also found the story of how the spouses met after the earthquake in Haiti to be plausible. The IAD accorded weight to the fact that it was the respondent who proposed marriage to Mr. Guillaume.

In this regard, it suggested that if the primary intent behind the marriage was Mr. Guillaume's immigration to Canada, chances are that he would have been the one to propose.

[13] When it analyzed Mr. Guillaume's testimony, the IAD found several of the elements that had caused the Officer to question the genuineness of the couple's relationship to be plausible.

a. Regarding the fact that there are not many photographs of the couple: The IAD found the explanation that the photos of the couple were on computers that were affected by viruses and that the contents of the computers in question had been lost or destroyed to be plausible.
b. Regarding the fact that there were not many guests at the wedding: The IAD found the explanation that the plan was to have a large reception in Canada with family and friends to be plausible. The IAD also accepted the explanation that the respondent's daughter did not travel to Haiti because she was in school and that she found the country to be dangerous, given the circumstances, including the 2010 earthquake. Finally, the IAD noted that since this was the respondent's second marriage, it is plausible that she would decide not to have a very elaborate reception.
c. The IAD found the fact that they own land together in Haiti that was mostly paid for by Mr. Guillaume to be another indication of the good faith of the marriage. The IAD also accepted the explanation that the land was to be used for crops, but that the respondent had abandoned this idea given the dangerous situation in the country.
d. The IAD also viewed as significant the fact that the respondent had travelled to Haiti to visit Mr. Guillaume since the sponsorship application, given the general instability of the

country, that she is a single parent and that she does not necessarily have the financial resources to do so.

e. The IAD found that the spouses have contact with members of their extended families and that Mr. Guillaume has conversations with the respondent's daughter.

f. Finally, the IAD was of the view that the age difference between the spouses was not an important aspect to take into account, given their other points in common.

[14] I note that at the hearing before the IAD, when questioned about the sponsorship application she filed in 2005 for a child of whom she claimed to be the biological mother, and subsequently the adoptive mother, the respondent finally explained that the child is her cousin's son.

IV. Positions of the parties

A. *Minister's position*

[15] While the Minister raises several arguments against the IAD's decision, the principal criticism is that the IAD did not conduct an analysis of the conditions set out in paragraphs 4(1)(a) and 4(1)(b) of the Regulations in two separate steps. Recalling that the assessment of the genuineness of the marriage must take place at the time the decision is made, whereas the assessment of the parties' intentions must take place at the time of the marriage, the Minister concludes that the IAD erred in finding that the evidence demonstrates that the relationship between the respondent and Mr. Guillaume is genuine and was not entered into for the purpose of obtaining a benefit under the Act, without distinguishing between the two prongs

of the test. The Minister argues that this error is determinative in and of itself and justifies setting aside the decision.

[16] The Minister also maintains that the IAD erred in concluding that the vague and not very detailed answers given by Mr. Guillaume during his interview were due to his limited ability in French and that he should therefore have had access to an interpreter during his interview with the visa officer to overcome these difficulties. In this regard, the Minister notes that Mr. Guillaume is educated and that he indicated in his application for permanent residence that he could communicate in French and did not need an interpreter at his interview. Furthermore, the Minister argues that Mr. Guillaume never indicated during the interview that he had any difficulty understanding questions or was in need of assistance.

[17] The Minister is of the opinion that the IAD erred in ignoring the evidence demonstrating the existence of a pull factor that would induce Mr. Guillaume to move to Canada. In this regard, he notes that Mr. Guillaume's brother and parents live in Canada.

[18] Finally, the Minister argues that the IAD erred in its assessment of the respondent's credibility by failing to mention in its decision her failed attempt to sponsor her cousin's son, whom she had first claimed to be her biological son, and later her adopted son. This, according to the Minister, taints the respondent's credibility and should have been mentioned by the IAD.

B. *Respondent's position*

[19] The respondent, meanwhile, agrees that the assessment of the two prongs of the test in subsection 4(1) of the Regulations is disjunctive. That being said, the respondent submits that the IAD referred to [TRANSLATION] "two temporally distinct sets of facts" and that the fact that these two prongs were assessed in a single paragraph in its decision does not mean that the appropriate analysis was not conducted.

[20] The respondent also argues that it was reasonable for the IAD to give greater weight to Mr. Guillaume's testimony at the hearing, since—given the language barrier that existed during the interview with the Officer—it more accurately represents his understanding of the questions put to him.

V. Issue and standard of review

[21] The only issue is whether the conclusion reached by the IAD—that the marriage was not entered into primarily for the purpose of acquiring a status for Mr. Guillaume—is reasonable (*Pabla v Canada (Citizenship and Immigration*), 2018 FC 1141 at paras 11–12; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; *Canada (Citizenship and Immigration) v Mbandjock*, 2020 FC 421 at para 2).

[22] While the Minister submits that the IAD erred in a number of respects, in my view, it is only necessary to analyze the first argument raised in order to assess this application for judicial review.

VI. Analysis

A. *IAD's decision unreasonable*

[23] It would be appropriate to begin by recalling the applicable principles. Section 12 of the Act provides that a foreign national who wishes to immigrate to Canada as a member of the family class may do so if that person has a relationship with a Canadian citizen or permanent resident, including a spouse. However, for spousal status to be valid for the purposes of the Act, the marriage between the spouses must be genuine and not have been entered into for the purpose of acquiring any status or privilege under the Act. These are the two prongs of the test in subsection 4(1) of the Regulations.

[24] In *Canada (Citizenship and Immigration) v Moise*, 2017 FC 1004, Justice Roy explains how subsection 4(1) of the Regulations and its resulting burden of proof is to be understood:

> [15] The burden on the respondent is to demonstrate, on a balance of probabilities, that her marriage is genuine and that it was not entered into primarily for the purpose of acquiring a status. Indeed, a marriage is disqualified if either of the conditions set out in paragraphs 4(1)(*a*) and (*b*) is not met (*Mahabir v. Canada (Citizenship and Immigration)*, 2015 FC 546 and *Singh v. Canada (Citizenship and Immigration)*, 2014 FC 1077). In other words, the respondent must meet both conditions. A marriage entered into for the purpose of acquiring a status or privilege will be flawed even if it subsequently becomes genuine. As well, a marriage that is validly entered into can become flawed for immigration purposes if it loses its genuineness.
>
> [16] On its face, the provision sets forth two different times when evaluations must be conducted. Regarding the genuineness of the marriage, the Regulations use the present tense, meaning that the genuineness of the marriage is evaluated at the time of the decision. On the other hand, the evaluation of the intent with which the marriage was entered into, i.e. primarily to acquire a status or a privilege, is in the past. The English reads "was entered" while the

> French reads “visait”; the evaluation is therefore conducted at the time of the marriage.

[25] These explanations demonstrate the importance of a two-step evaluation process. First, the evaluation of the genuineness of the marriage must take place at the time the IAD decision is made. Second, the evaluation of the intention with which the marriage was entered into must be made at the time of the marriage.

[26] It appears from the IAD’s decision that several elements were considered to be favourable. However, it is impossible to determine whether the elements were assessed for the genuineness of the marriage or for the intent behind it. No distinction is made by the IAD as to the evidence on which it relied. In this regard, the IAD concluded, at paragraph 24 of the decision:

> In considering all the evidence, the panel determines that the marriage is genuine and that it was not entered into for the purpose of acquiring an advantage under the Act. Therefore, for all these reasons, the appeal is allowed.

[27] It therefore appears, and as I find the Minister correctly argues, that the two prongs of the test in subsection 4(1) of the Regulations were taken together and that separate conclusions were not reached. It is also impossible to determine from the decision which evidence was used to support which test in the IAD’s decision.

[28] In *Canada (Citizenship and Immigration) v Larouche* (January 17, 2019), IMM-2797-18, (Federal Court) [*Larouche*] (unreported), Justice St-Louis allowed the application for judicial

review on the basis that the IAD's decision did not indicate that there had been a separate analysis of the two parts of subsection 4(1) of the Regulations.

[29] While the case law holds that some evidence may be used to analyze both prongs of the test in subsection 4(1) of the Regulations, the analysis must be conducted in two distinct steps (*Ferraro v Canada (Citizenship and Immigration*), 2018 FC 22). I reproduce below what Justice McDonald had to say in this regard:

> [13] There is also a temporal distinction between each test. Claims under s.4(1)(a) are assessed at the time of the marriage, while claims under s.4(1)(b) are assessed at the present time (*Gill*, at paras 32-33). As confirmed in *Lawrence v Canada (Citizenship and Immigration)*, 2017 FC 369 at para 14, evidence relevant to one element of the test can also be relevant to the other.

[30] Here, as in *Larouche*, I am of the view that the IAD did not conduct a two-step analysis or draw a separate conclusion for each prong of the test. Moreover, it did not mention or weigh the specific evidence relied upon to satisfy each prong.

[31] From the case law cited in this decision, the Court has identified a two-pronged test. After analysis, the IAD could reach a decision to the effect that the marriage is indeed genuine, but this cannot be done without analyzing the evidence to ensure that it satisfies both prongs of the case law test. The ultimate conclusion will depend on the determination of these two essential prongs of the test.

VII. Conclusion

[32] For the reasons set out above, the application for judicial review is allowed.

JUDGMENT in IMM-1775-19

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is referred back to a differently constituted panel of the IAD for redetermination.

There is no question of general importance to be certified.

"Michel M.J. Shore"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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