Federal Court  Cour fédérale

Date: 20201223

Docket: IMM-5376-19

Citation: 2020 FC 1186

Ottawa, Ontario, December 23, 2020

PRESENT: Mr. Justice McHaffie

BETWEEN:

SANDEEP SINGH GREWAL
BY HIS LITIGATION GUARDIAN
DILBAGH SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] At the conclusion of Sandeep Singh Grewal's appeal hearing before the Immigration Appeal Division (IAD), the Minister of Citizenship and Immigration was satisfied that his marriage to Gurmeet Kaur was genuine. The Minister recommended to the IAD that the appeal be allowed while leaving the ultimate decision up to the IAD. Despite the Minister's consent, the

IAD dismissed the appeal, finding the marriage not genuine. The IAD gave a number of reasons for its conclusion, most of which related in one form or another to Mr. Grewal's intellectual disability and associated speech limitations. This included the IAD not being satisfied that Mr. Grewal truly understood his marriage, or that he had the mental capacity to consent to a marriage.

[2] I agree with Mr. Grewal that the IAD's decision was procedurally unfair and that this is sufficient to determine the appeal. Before Mr. Grewal's counsel had examined Mr. Grewal's father and litigation guardian, Dilbagh Singh, the IAD effectively told the parties that counsel need only question Mr. Singh if the Minister was not going to consent to the appeal. The Minister gave that consent, and recommended the appeal be allowed. Although indicating that it would reserve its decision, the IAD did not indicate any areas of concern or disagreement with the parties' mutual position, and Mr. Grewal's counsel was not invited to question Mr. Singh. Nonetheless, the IAD then dismissed the appeal, on grounds on which Mr. Singh could have given relevant evidence. I conclude that this was unfair as it did not give Mr. Grewal the opportunity to fully present his case.

[3] The application for judicial review is therefore allowed and Mr. Grewal's appeal is remitted to the IAD for redetermination by a differently constituted panel. Although this is sufficient to dispose of this application for judicial review, I will briefly address some concerns with the IAD's approach to the assessment of the genuineness of a marriage in which a party has intellectual disabilities, which in my view merit comment.

II. Issues and Standard of Review

[4] Mr. Grewal raised a number of issues on this application for judicial review, including the applicability in the immigration context of the principles governing joint submissions set out in the Supreme Court of Canada's decision in *R v Anthony-Cook*, 2016 SCC 43, and the reasonableness of the IAD's genuineness determination. I will briefly address these other issues below, but conclude that the fairness issue raised by Mr. Grewal is determinative of the application. I therefore view the sole issue as the following:

> Was the conduct of the appeal hearing and the IAD's subsequent dismissal of the appeal procedurally fair?

[5] Issues of procedural fairness are not subject to review on the deferential reasonableness standard. Rather, the Court assesses whether, having regard to all of the circumstances, a fair and just process was followed: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 77. Strictly speaking, no standard of review is being applied, although the reviewing exercise is "best reflected in the correctness standard": *Canadian Pacific* at para 54, quoting *Eagle's Nest Youth Ranch Inc v Corman Park (Rural Municipality #344)*, 2016 SKCA 20 at para 20.

III. Analysis

A. *The IAD's Decision was Procedurally Unfair*

(1) Nature of and Background to the Hearing

[6] Mr. Grewal married Ms. Kaur in February 2017, in Rajoana Kalan, India. The marriage was arranged by their families. Mr. Grewal, a Canadian permanent resident, filed an application in July 2017 to sponsor Ms. Kaur for permanent residence in the family class as his spouse, pursuant to paragraph 117(1)(*a*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

[7] Subsection 4(1) of the *IRPR* provides that a foreign national will not be considered a spouse if the marriage was not genuine, or was entered into primarily for the purpose of acquiring a status or privilege under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]:

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

[8] In 2018, a visa officer conducted an interview with Ms. Kaur and Mr. Grewal, and concluded their marriage fell within subsection 4(1). The visa officer therefore refused Ms. Kaur's application for a permanent resident visa. Mr. Grewal appealed the refusal to the IAD pursuant to subsection 63(1) of the *IRPA*. Such appeals are heard by the IAD as hearings *de novo*: *IRPA*, s 67(2); *Mendoza v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 934 at paras 18–20. As the Minister underscored during submissions, and as the Supreme Court of Canada has confirmed, hearings before the IAD are adversarial in nature, with the IAD being established as a court of record: *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at paras 46, 82; *IRPA*, s 174.

[9] In advance of the hearing, Mr. Grewal filed a psychiatrist's report from Dr. Mohammed Sayeed Ahmed that had been prepared in 2017 after the marriage but in advance of the sponsorship application. Dr. Ahmed's report concluded that Mr. Grewal had "[i]ntellectual disability probably moderate severity with learning disabilities limited education and language," and that he "seems to have understanding of marriage."

[10] Mr. Grewal also filed a more recent 2019 psychiatrist's report from Dr. Christopher Richards-Bentley that focused on his ability to understand and appreciate marriage. Dr. Richards-Bentley gave his opinion that Mr. Grewal "was able to understand and appreciate the decision to get married and that he continues to demonstrate adequate capacity in this realm," and discussed his conversations with Mr. Grewal that supported this conclusion. Dr. Richards-Bentley also described Mr. Grewal's speech difficulties, speculating that "he may suffer from an Expressive Aphasia." Given these speech difficulties, Dr. Richards-Bentley's

opinion was that Mr. Grewal would meet the criteria for a "vulnerable person" for purposes of his IAD hearing, criteria that are set out in the *Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB*, December 15, 2012 issued by the Immigration and Refugee Board (IRB).

[11] A designated representative was appointed for Mr. Grewal pursuant to subsection 167(2) of the *IRPA*. At the IAD hearing, the Minister and Mr. Grewal were represented by counsel. Mr. Grewal, Ms. Kaur, and Mr. Singh all gave evidence at the hearing, Ms. Kaur attending from Rajwana, India by teleconference. There were difficulties in understanding Mr. Grewal's testimony, but he was able to respond to a large number of questions from his own counsel, the Minister's counsel, and the IAD.

(2) The Minister's Recommendation and Conclusion of the Hearing

[12] After Mr. Grewal and Ms. Kaur had given their evidence, Mr. Grewal intended to call Mr. Singh. Counsel for the Minister referred to a discussion with Mr. Grewal's counsel and made a proposal to examine the witness first:

> **MINISTER'S COUNSEL**: Mr. Member, I had a brief conversation with counsel earlier and I suggested to counsel, I just had a few questions around the appellant's first marriage that I would like to ask his father about knowledge and arrangements.
>
> **PRESIDING MEMBER**: Yeah.
>
> **MINISTER'S COUNSEL**: And the sponsorship application. And I advised counsel if he's okay with it I can lead questioning to sort [of] get that out of the way, after which the Minister may be able to present their position.
>
> **PRESIDING MEMBER**: Sure.

MINISTER'S COUNSEL: And then I left it up to counsel to determine.

PRESIDING MEMBER: No problem, okay. That's okay?

COUNSEL: That's fine.

[Emphasis added.]

[13] As anticipated, at the conclusion of the Minister's questioning of Mr. Singh, the Minister was able to provide their position. The following exchange occurred:

MINISTER'S COUNSEL: Okay. I have no further questions, Mr. Member.

PRESIDING MEMBER: Thank you. Counsel, questions?

COUNSEL: Yes, I do have question for him. The Minister has any position?

MINISTER'S COUNSEL: I can present my position at this point, Mr. Member, but ultimately the decision will be up to the panel.

PRESIDING MEMBER: Sir, before you go on, Counsel, you don't have any questions?

COUNSEL: I have.

PRESIDING MEMBER: Okay. But you were just wondering if the Minister has a position.

COUNSEL: That's right.

PRESIDING MEMBER: Okay. So if you're going to consent, Ms. Sharma, I'm willing to hear from you, if you're not then of course counsel should have the opportunity to ask the questions of the witness.

MINISTER'S COUNSEL: I am able to (inaudible).

PRESIDING MEMBER: Okay.

MINISTER'S COUNSEL: I would like to provide a few reasons for the record.

[Emphasis added.]

[14] The Minister's counsel then proceeded to give submissions as to why they recommended allowing the appeal. This included referring to the compatibility of Mr. Grewal and Ms. Kaur, discussing the information regarding the marriage arrangements, and noting that Dr. Richards-Bentley's report was "quite thorough and addressed his mental capacity to consent." Counsel referred to the evidence of Mr. Grewal and Ms. Kaur, and the hearing concluded as follows:

> **MINISTER'S COUNSEL**: […] so therefore on a balance of probabilities I'm comfortable recommending that the appeal be allowed. And I'll leave the ultimate decision up to you.
>
> **PRESIDING MEMBER**: Thank you very much. Counsel, anything to add?
>
> **COUNSEL**: No, I agree with the Minister.
>
> **PRESIDING MEMBER**: Okay. All right. I'm going to reserve my decision, I want to give more thought to the evidence that I've heard and I want to give more thought to the Minister's submissions, I have a lot to think about. I want to make sure I get the – make the best decision in this appeal based on the evidence that I've heard from the appellant.
>
> Didn't get as much as I wanted to from the appellant, but I did get some evidence and that's appreciated.
>
> I want to consider more what I heard from the applicant. Of course I want to consider more from the appellant's father who gave some evidence.
>
> And so when I come to a decision in this case I'll let you all know as soon as possible what that will be. It shouldn't take me longer than about one month from now to render my decision. You will all receive my decision in the mail, it will be in writing of course.
>
> And I just want to confirm the address of the appellant, it is [address stated]?
>
> **COUNSEL**: Yes.

> **PRESIDING MEMBER**: Okay. I thank you all very much for your time, the appellant, counsel, the witness, the interpreter and last but not least the designated representative. Thank you all, this hearing is now concluded, thank you.
>
> [Emphasis added.]

[15] When the IAD issued its written decision, it referred to the Minister's consent and the reasons given for that consent. However, for a number of stated reasons, the IAD concluded that the marriage was not genuine, but was entered into for the purpose of Ms. Kaur acquiring a status or privilege in Canada. These reasons included the IAD's conclusion that they were not convinced that Mr. Grewal "truly understands his marriage and its purpose" or that he "had the mental capacity to consent to a marriage." The IAD therefore stated that it disagreed with the Minister's submissions and concluded that Mr. Grewal had failed to meet his burden to persuade the panel that the marriage did not fall within subsection 4(1) of the *IRPR*.

(3) The Hearing was Unfair

[16] I agree with Mr. Grewal that it was unfair for the IAD to have acted in the manner that it did. The IAD recognized at the outset of the proceeding that Mr. Singh's evidence was important, indicating that he would be "giving most of the evidence." After examination by the Minister's counsel, counsel for Mr. Grewal stated that he had questions for Mr. Singh. In response, the IAD made clear to counsel for both parties that in its view, such questions need only be asked if the Minister was not consenting. The Minister consented, and Mr. Grewal's counsel asked no questions of Mr. Singh in consequence. In such circumstances, rendering an adverse decision without having heard the remainder of Mr. Singh's evidence as elicited by Mr. Grewal's counsel resulted in Mr. Grewal being unable to fully present his case. Had the IAD

considered that it might conclude that the marriage was not genuine, either at the hearing or subsequently, it had to ensure, at the least, that Mr. Grewal understood this and had the opportunity to complete his evidence, either that day or by reconvening the hearing.

[17] The impact of this can be seen with reference to the question of Mr. Grewal's mental capacity to understand marriage or consent to it. Early in the hearing, the Minister's counsel indicated they had had a preliminary conference with Mr. Grewal's counsel and had addressed mental capacity concerns. They said that Dr. Richards-Bentley's report was quite thorough, but that they still wanted to ask Mr. Grewal a few questions about his understanding of marriage to gauge his understanding. Some discussion ensued, including Mr. Grewal's counsel indicating that Mr. Singh would be addressing, among other issues, the question of mental incapacity.

[18] At the end of the hearing, the Minister indicated that they were satisfied on the issue of mental capacity. The IAD gave no indication that they considered that issue—an issue on which Mr. Grewal was expressly expected to give evidence—still "live" notwithstanding the Minister no longer considering it an issue. Yet the IAD found in its decision that Mr. Grewal did not have the capacity to understand or consent to the marriage.

[19] In this regard, I agree with Mr. Grewal that the Federal Court of Appeal's decision in *Velauthar v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 425 (CA) is relevant. There, a panel advised counsel before submissions that the only issue was whether the persecution the claimant feared was based on a Convention ground. This implied that credibility was not in issue, so the parties did not address credibility in their submissions. The Federal Court

of Appeal found it to be a “gross denial of natural justice” for the panel to then make an adverse determination on grounds of credibility: *Velauthar* at para 4.

[20] *Velauthar* has been applied by this Court in cases where a tribunal directly or by implication gave the misleading impression that a matter or issue was resolved: *Sivamoorthy v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 408 at paras 40–44; *Zhang v Canada (Citizenship and Immigration)*, 2015 FC 1031 at paras 30–38. In my view, these principles are applicable in this case. The IAD’s statements directly or by implication gave the impression that Mr. Grewal need not call further evidence on the issue of genuineness if the Minister consented.

[21] The Minister argues that it was always clear that the IAD might potentially decide against Mr. Grewal. Citing Justice Zinn’s decision in *Fong*, they submit that a joint recommendation such as the Minister’s recommendation to the IAD to allow the appeal does not bind the IAD, and does not relieve an appellant from their obligation to make their case: *Fong v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 1134 at para 31. They also note that the Minister expressly left the issue to be decided by the IAD, and that the IAD reserved its decision stating that it wanted to consider the submissions and evidence further.

[22] In my view, the Minister cannot rely in these circumstances on the consent being non-binding, or on the general statement that the Minister would “leave the ultimate decision up to [the IAD].” The IAD’s indication that Mr. Grewal need only proceed with examination of Mr. Singh if the Minister did not consent precludes such reliance, as it gave a direct signal to

counsel that the evidence was not required. Nor does the fact that the IAD reserved its decision change the situation. While the IAD's indication that it would let the parties know "what that [decision] will be" might be taken as a statement that the IAD was contemplating an adverse finding on genuineness, this statement was made after the hearing was effectively over, after the decision was reserved, and without a reasonable opportunity in the circumstances for Mr. Grewal's counsel to then argue that if the IAD was going to make an adverse decision, Mr. Singh's further evidence should first be heard.

[23] I therefore conclude that the conduct of the hearing was not fair to Mr. Grewal. This is sufficient to be dispositive of the application for judicial review. Nonetheless, given the context and the arguments made, some additional discussion is warranted on the related issue of the role of the Minister's consent and recommendation that the appeal be allowed.

(4) The Need to Give Serious Consideration to Joint Submissions

[24] Both parties referred to case law arising from the context of a joint submission to the IAD regarding a stay of a removal order. That case law establishes that a joint submission on a stay is not binding on the IAD, but should be given serious consideration: *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16488 (FC) at para 14; *Malfeo v Canada (Citizenship and Immigration)*, 2010 FC 193 at paras 12–19; *Hussain v Canada (Citizenship and Immigration)*, 2010 FC 334 at paras 20–21; *Fong* at para 31.

[25] In *Nguyen*, Justice Lemieux of this Court referred to and adopted the reasoning in criminal cases relating to joint submissions on sentencing. He noted that while immigration

removals were a different context than criminal sentencing, there were analogies between the factors relevant to a stay and the matters taken into account in sentencing: *Nguyen* at paras 10–14. He concluded that the then Appeal Division of the IRB had erred in failing to explain why joint submissions on a five-year stay were not endorsed: *Nguyen* at paras 9, 15.

[26] Justice Lemieux applied the same principles a decade later in *Malfeo*, again recognizing the differences and similarities between stays of removal by the IAD and criminal sentencing: *Malfeo* at paras 12–16. The Court found that the IAD erred in rejecting a joint submission without asking for further submissions from the parties, and in failing to give serious consideration to the joint submission by rejecting it in a perfunctory manner without analysis: *Malfeo* at paras 17–20.

[27] The IAD's rejection of a joint submission was accepted in *Fong*. There, when advised that the parties had a joint recommendation for disposition, the IAD expressly stated that the parties could make their submission but that the IAD was "going to have to think on it very seriously," while also interjecting with comments that showed their concerns with the submission: *Fong* at paras 27–29. Citing *Nguyen* and *Malfeo*, Justice Zinn found that the IAD was entitled to reject the joint submission "so long as it provided reasons for doing so," which it had done: *Fong* at paras 31–32; see also similar results in *Tuel v Canada (Citizenship and Immigration)*, 2011 FC 223 at paras 19–23 and *Doe v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 518 at paras 44–49.

[28] The principle in *Fong* has also been applied beyond the context of stays of removal. In *Saroya*, Justice Mosley applied it to an appeal based on humanitarian and compassionate (H&C) grounds, finding that the IAD could reject the joint submission "if it provides reasons for doing so": *Saroya v Canada (Citizenship and Immigration)*, 2015 FC 428 at paras 5–6, 20–21. In *Tung*, Justice McDonald found the principle applicable in the context of a cessation application to the Refugee Protection Division (RPD), confirming that the RPD may consider other grounds for cessation even though the Minister and applicant had identified only one ground for cessation: *Tung v Canada (Citizenship and Immigration)*, 2018 FC 1224 at paras 26–32.

[29] Justice Campbell expanded on the nature of joint submissions and their rejection in *Al-Abdi v Canada (Citizenship and Immigration)*, 2016 FC 262. Adopting the discussion from *Malfeo*, he emphasized at paragraph 10 the difference between rejecting a joint submission and simply rejecting one party's argument:

> There is a difference between an argument advanced by one of the parties to a litigation, and a joint submission presented by Counsel for both parties. An argument may be rejected by providing a supportable reason. A joint submission is not an argument; it is an agreement between the parties which goes directly to removing issues in the litigation from determination. This is why the law has established the principle that a joint submission must not be disregarded. A finding as to whether regard was paid to a joint submission is case dependent. That is, on judicial review an evaluation must be made of the nature of the impact of the joint submission on the person or persons directly affected, which in turn defines the quality of regard expected of the decision-maker to whom the joint submission is directed. The issue in each individual case is whether the joint submission was fairly regarded.
>
> [Emphasis added.]

[30] I agree with Justice Campbell's comments regarding the nature of a joint submission in this context. It is to be recalled that, as the Minister underscored in submissions, the IAD hears matters in an adversarial context: *Chieu* at para 82. Such a context inherently involves litigation decisions being made by the adversarial parties that may have an impact on the outcome of the case. It may also involve parties conceding or reaching agreement on particular issues so as to avoid needing to litigate every issue. Such concessions and agreements improve the efficiency of the litigation process. There is some indication in the record of this proceeding that such discussion occurred, with counsel for the parties discussing the extent and nature of the evidence on Mr. Grewal's understanding of marriage, and the order of questioning of Mr. Singh.

[31] The adversarial context may even involve resolution of litigation as a whole. As the Minister conceded in argument, the Minister and an appellant may resolve an IAD appeal before hearing on the basis that, for example, the Minister would redetermine the initial application for permanent residence. Indeed, the *IAD Rules* expressly contemplate and encourage the parties to resolve an appeal without a hearing, including through alternative dispute resolution processes: *Immigration Appeal Division Rules*, SOR/2002-230, Rule 20.

[32] The Supreme Court of Canada's recent decision in *Vavilov* also recognizes that the submissions of the parties may act as a form of "constraint" on administrative decision making: *Vavilov* at paras 106, 127–128. Given the significant impact on the affected parties of an adverse determination, in my view the "culture of justification" espoused by *Vavilov* supports the recognition in *Al-Abdi* that there is a heightened burden on the IAD to justify why it is departing

from a joint submission or considering issues that are not in dispute between the parties: *Vavilov* at paras 79–81, 127–128, 133–135; *Al-Abdi* at para 10.

[33] At the same time, the IAD must act within its statutory mandate. In the case of stays of removal, the context for most of the foregoing cases, subsection 66(*b*) of the *IRPA* permits the IAD to grant a stay of removal on an appeal in accordance with the factors set out in section 68. The Minister as a party to the appeal cannot itself issue a stay in this context: see, *e.g.*, *Ukwesa v Canada (Public Safety and Emergency Preparedness)*, 2008 CanLII 74873 (CA IRB) at para 11; see also *IRPA*, ss 50(*e*), 53(*d*) and *IRPR*, ss 230, 233 in respect of the Minister of Public Safety and Emergency Preparedness's distinct jurisdiction to stay a removal. In order to stay a removal, the IAD must itself be satisfied that the H&C requirements of subsection 68(1) of the *IRPA* are met. Similarly, to allow an appeal on H&C grounds, as was at issue in *Saroya*, the IAD must be satisfied that the H&C considerations warrant relief: *IRPA*, s 67(1)(*c*). Thus, as set out in *Nguyen* and *Malfeo*, the parties' joint agreement on the issue cannot be binding on the IAD, although the adversarial context dictates that it should be given serious consideration.

[34] In this regard, it may not be sufficient, as Justice Campbell concluded in *Al-Abdi*, for the IAD to simply state that it does not take the submissions lightly: *Al-Abdi* at paras 14–20. In the present case, the IAD did not even do that. It simply noted the Minister's consent and briefly summarized the Minister's reasons, before proceeding with its own separate analysis of the issues.

[35] The Minister argues that the IAD setting out the reasons for its decision is sufficient to satisfy the requirement described in *Fong* and *Doe* to provide reasons why it did not accept the joint submission: *Fong* at para 31; *Doe* at para 46. In my view, this does not adequately satisfy this Court's recognition of the import and nature of joint submissions or recommendations regarding an appeal, and would treat them in the same manner as one party's submission: *Nguyen* at para 11; *Al-Abdi* at para 10. I note that in each of *Fong*, *Doe*, and *Saroya*, in which this Court found no reviewable error in the rejection of a joint recommendation, the IAD expressly gave the joint recommendation careful consideration, noting that it did not take the contrary decision lightly: *Fong v Canada (Public Safety and Emergency Preparedness)*, 2010 CanLII 55730 (CA IRB) at paras 37–38, 62, 76; *Doe v Canada (Public Safety and Emergency Preparedness)*, 2015 CanLII 94691 (CA IRB) at para 17; *Saroya v Canada (Citizenship and Immigration)*, 2014 CanLII 85462 at paras 12, 25, 27.

[36] In my view, the IAD's decision did not adequately show that it gave serious consideration to the joint recommendation or explain with clarity why it considered there was good cause to reject that recommendation.

[37] Having reached this conclusion, I need not address Mr. Grewal's further argument that the Supreme Court's decision in *Anthony-Cook*, which imposed a stringent "public interest" standard to joint submissions on sentence, ought to be applied in the IAD context. I will simply note that I see some merit in each of the parties' arguments on this question, and that the IAD is best placed at first instance to consider the applicability of this common law rule to its administrative context: *Vavilov* at paras 111–113.

B. *Observations on the IAD's Grounds for Dismissal*

[38] Having decided that the matter must be returned for redetermination on grounds of fairness, I need not address the merits of the IAD's decision. Nor do I propose to do so at length, as the IAD will and should have the opportunity to independently redetermine the matter. However, I provide the following observations regarding two aspects of the IAD's decision because I consider they warrant comment, and in hopes that they provide useful guidance on the redetermination.

[39] The first aspect pertains to the IAD not being satisfied that Mr. Grewal sufficiently understood the meaning of marriage or had the ability to consent. Although the IAD referred to the two psychiatrists' reports, each of which set out the opinion that Mr. Grewal understood marriage, it reached the opposite conclusion. It did so without giving any reason for disagreeing with or discounting the reports. Rather, the IAD simply said that it did not find Dr. Ahmed's report "helpful" without saying why, and giving only passing mention to Dr. Richards-Bentley's report, which the Minister had made express reference to as "quite thorough" in their submissions recommending allowing the appeal.

[40] The IAD's only stated justifications for its conclusion were (i) its apparent frustration with the difficulty in obtaining evidence from Mr. Grewal; (ii) a statement made by Mr. Grewal's former first wife, made in a petition for annulment, which included statements such as that Mr. Grewal "is of abnormal brain and is an insane person"; and (iii) Mr. Grewal's inability to express the reason for his previous marriage ending in annulment. In my view, the

IAD's justification for its conclusion that Mr. Grewal did not demonstrate the mental capacity to understand marriage was wholly inadequate given the important legal and personal impact of such a finding.

[41] The second aspect has to do with the IAD's various observations related to the impact of Mr. Grewal's intellectual disability on the genuineness of the marriage. These included findings that:

- whatever discussions Mr. Grewal had with his wife do "not appear to be of substance given his limited ability to converse with [Ms. Kaur] as it relates to their marital relationship";

- it was "difficult to understand" and "makes little sense" that Ms. Kaur's mother found Mr. Grewal to be a suitable match given the educational and intellectual differences between the two, and Mr. Grewal's "speech limitations and low mental and intellectual development";

- Ms. Kaur was "willing to accept the appellant's personal, intellectual and economic limitations […] in exchange for permanent residence";

- Ms. Kaur's responses regarding what she and Mr. Grewal talk about on the phone were "general in nature without more specifics which is complicated given the appellant's mental and intellectual limitations";

- there was a "continuing theme" that Mr. Grewal was unable "to appropriately communicate for the purposes of a marriage to be sustaining";

- assuming the marriage is genuine, “it would deteriorate relatively quickly,” similar to Mr. Grewal’s first marriage; and

- Mr. Grewal and Ms. Kaur “failed to properly articulate themselves in a fashion that would overcome the concerns based on questions asked and answers given.”

[42] The overall impression given by the IAD’s reasons was that, in addition to its frustration with Mr. Grewal’s difficulties in giving evidence, the IAD had difficulty understanding what a person with intellectual disabilities could bring to a relationship other than an opportunity to obtain permanent residence in Canada. This is seen most clearly in the IAD’s reference to the fact that for Ms. Kaur to have been “willing to accept” Mr. Grewal’s limitations, the potential for permanent residence must have been offered “in exchange.” This focus on Mr. Grewal’s disability as both a negative and a defining element of his being is a unidimensional view of disability. It also largely ignores Ms. Kaur’s evidence of other valued elements of Mr. Grewal’s character, notably his sobriety, wisdom, and religious devoutness.

[43] The IAD’s repeated references to the nature of the conversations between Mr. Grewal and Ms. Kaur similarly appears to assume a particular level of “substantive” discussion that must occur between couples, and to hold Mr. Grewal’s inability to conduct conversations at that level against his ability to enter a genuine marriage. While the IAD recognized that “relationships and marriages are not all cut from the same cloth,” it nonetheless based material aspects of its conclusions on the fact that Mr. Grewal and Ms. Kaur’s marriage would not be the same as the IAD’s apparent frame of reference for a genuine marriage. In my view, it is inappropriate to do

so without adapting or accommodating that frame of reference to the differences that would arise from Mr. Grewal's disability.

[44] The IAD drew direct conclusions regarding credibility and genuineness from these observations. For example, the IAD made negative credibility findings as a result of its observation that Ms. Kaur was "willing to accept" Mr. Grewal's intellectual disability in exchange for permanent residence; and from its conclusions that their discussions were not "of substance."

[45] In response to questions about these concerns raised at the hearing, the Minister argued that the IAD was simply applying its expertise in respect to arranged marriages from India, rather than undertaking a discriminatory analysis based on an intellectual disability. I cannot accept this explanation, as there is no indication that the IAD was relying on any evidence or expertise regarding what would be accepted in an arranged marriage in regard to many of its statements. The IAD's findings on the nature of conversations in a couple, for example, referred to couples generally and made no reference to what parties to an arranged marriage were expected to discuss. To the extent that the IAD intended, as the Minister argued, to rely on its knowledge or expertise on arranged marriages in India, it did not "demonstrate through its reasons that [its] decision was made by bringing that institutional expertise and experience to bear": *Vavilov* at para 93.

[46] I recognize that, as the IAD stated, assessing the genuineness of a marriage in the immigration context can be challenging in any circumstance. The context of an appellant with

intellectual disabilities and speech limitations may add a challenge to the task, both in taking evidence and in making the assessment. But that challenge must be undertaken without resort to assumptions about marriage, or about what a person with intellectual disabilities may bring to a relationship, that add unwarranted hurdles to the analysis.

IV. Certified Questions

[47] Mr. Grewal posed four questions for certification, two with respect to the question of joint submissions and two with respect to who bears the onus of establishing mental incapacity:

1. Does the IAD err if it rejects a submission by the Minister to grant an appeal, which was agreed with by the Applicant?

2. Is the IAD required to follow *R v Anthony-Cook*, 2016 SCC 43 in relation to joint submissions regarding a spousal sponsorship appeal?

3. Does the Minister bear the onus of proof to prove mental capacity of the Appellant (sponsor) in appeal to the Immigration Appeal Division of a refusal of a spousal sponsorship application for permanent residence, in the circumstance where the Minister recommends that the appeal be granted?

4. Does the Minister bear the onus of proof to prove mental capacity of the Appellant (sponsor) in appeal to the Immigration Appeal Division of a refusal of a spousal sponsorship application for permanent residence, in the circumstance where the Minister initially challenges the mental capacity of the Appellant – sponsor?

[48] Mr. Grewal recognized that if successful on the issue of procedural fairness, none of these questions would be determinative and need not be asked or certified. I agree. Given my conclusions on the procedural fairness issue, I conclude that none of these questions are dispositive of the outcome, a necessary condition for certification: *Lunyamila v Canada (Public*

Safety and Emergency Preparedness), 2018 FCA 22 at para 46. I therefore decline to certify any of the proposed questions.

V. Conclusion

[49] The application for judicial review is therefore allowed, and Mr. Grewal's appeal is sent back to the IAD for redetermination by a differently constituted panel.

JUDGMENT IN IMM-5376-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed and Sandeep Singh Grewal's appeal is remitted to the Immigration Appeal Division for redetermination by a differently constituted panel.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5376-19
STYLE OF CAUSE:	SANDEEP SINGH GREWAL BY HIS LITIGATION GUARDIAN DILBAGH SINGH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

HEARING HELD BY VIDEOCONFERENCE ON JULY 10, 2020 FROM OTTAWA, ONTARIO (COURT) AND TORONTO, ONTARIO (PARTIES)

JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	DECEMBER 23, 2020

APPEARANCES:

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Judy Michaely	FOR THE RESPONDENT

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