

Federal Court



Cour fédérale

Date: 20210625

Docket: IMM-2984-20

Citation: 2021 FC 670

Ottawa, Ontario, June 25, 2021

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

SHARIFULLAH AMIN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a Decision of the Immigration and Refugee Board of Canada, Immigration Appeal Division [the “Panel”], dated June 22, 2020 [the “Decision”], finding that the Applicant’s marriage was not genuine, and dismissing the Applicant’s appeal of the refusal of his sponsorship application for his spouse’s permanent residence application.

II. Background

[2] The Applicant, Sharifullah Amin, was born in Afghanistan and has lived most of his childhood in the Afghan Refugee Camp in Peshawar, Pakistan [the “Refugee Camp”]. The Applicant escaped the security situation in Afghanistan and became a citizen of Canada in 1997.

[3] The Applicant has cerebral palsy and has been on medical leave for several years.

[4] The Applicant and his spouse, Mrs. Khalida Amin, are first cousins, paired for marriage around 1997 when they were children. She was born and has lived her entire life in the Refugee Camp and has not received a formal education.

[5] The arranged marriage between the Applicant and his spouse was held around January 30, 2014 in Pakistan, in a traditional ceremony. On November 18, 2014, their daughter was born in Peshawar, Pakistan.

[6] The Applicant applied to sponsor his spouse’s application for permanent residence to Canada in 2018. On April 11, 2019, the interview was held at the Canadian High Commission in Islamabad, with the assistance of a Pashtu interpreter. The sponsorship application was refused on August 9, 2019.

[7] The Applicant appealed the decision to the Immigration Appeal Division, Immigration and Refugee Board of Canada. The hearing before the Panel was held on March 11, 2020. The

Panel determined, on the balance of probabilities, that the marriage was not genuine under subsection 4(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the “*Regulations*”]. The Panel dismissed the sponsorship appeal in the Decision, dated June 22, 2020.

[8] The Applicant seeks an Order setting aside the Decision and remitting the matter to a different Panel of the Immigration Appeal Division in accordance with the directions of this Court and costs.

III. Decision Under Review

[9] The Panel dismissed the sponsorship application under subsection 4(1)(b) of the *Regulations*, finding, on the balance of probabilities, that the marriage was not genuine. The Panel stated that there were “significant gaps, discrepancies and inconsistencies in the evidence... for which satisfactory explanations were not provided...”. The birth of the spouses’ child did not outweigh the concerns with the evidence. The Panel did not include an exhaustive list of these problems, instead providing “some examples” to support its decision:

- A. While the Applicant and his spouse testified that they have maintained contact and communication with each other regularly since they met, there were many inconsistencies, including when the Applicant has visited his spouse and child and how frequently they communicated;

- B. There was a discrepancy in the spouses' testimony concerning how photographic evidence was lost during one of the Applicant's trips and the depth of their communication remains ambiguous;
- C. Although providing some consistent knowledge, the Applicant and his spouse lacked understanding of important elements of each other's lives;
- D. The Applicant provided three different years of birth for his daughter and no cogent explanation related to the asserted memory issues;
- E. The spouse was not aware of the type of work the Applicant had performed prior to his medical leave;
- F. The Applicant's spouse could not remember when she was engaged;
- G. The spouses provided relatively consistent, but vague evidence of their future plans, which did not include a possible life together outside of Canada; and
- H. The Applicant and his spouse have a child together and while generally an indicia of a genuine relationship, it is not determinative. The birth of the child was found not to outweigh the numerous concerns with the evidence.

IV. Issues

[10] The issues as it relates to the Decision under review are:

A. Did the Panel breach the duty of procedural fairness?

B. Is the Decision reasonable?

V. Standard of Review

[11] The issue of procedural fairness is subject to the correctness standard (*Yeager v Canada (Attorney General)*, 2020 FCA 176 at para 23).

[12] The issue of whether the Decision is reasonable is reviewable on the reasonableness standard (*Zhou v Canada (Citizenship and Immigration)*, 2020 FC 633 at paras 33-34 [*Zhou*]; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]):

[33] Second, with respect to the substance of the decision, the parties agree, as do I, that the IAD's decision should be reviewed on a reasonableness standard... Whether a marriage is genuine or was entered into primarily for an immigration purpose are highly factual inquiries which often turn on credibility determinations. As a result, decision makers are entitled to deference from reviewing courts. This is particularly the case when the decision maker has had the opportunity to question the spouses.

[34] Following *Vavilov*, reasonableness is now the presumptive standard of review, subject to specific exceptions "only where required by a clear indication of legislative intent or by the rule of law" (at para 10). In my view, there is no basis for derogating from the presumption that reasonableness is the applicable standard of review here.

VI. Relevant Provisions

[13] Subsection 4(1) of the *Regulations* provides:

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.

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.

VII. Analysis

[14] It is the Applicant's position that instead of starting with the presumption that the marriage is genuine because of the presence of a child of the marriage, the Panel drew undue emphasis on unexplained inconsistencies and contradictions in the evidence and made unreasonable and unsupportable findings. The Panel further ignored the cultural context and circumstances of the arranged marriage, the level of sophistication of the parties and other relevant evidence that cogently supported the genuineness of the marriage. The Panel's negative credibility findings are unreasonable and unjustified in light of the record.

[15] The Respondent argues the Panel reasonably concluded that the Applicant's relationship with his spouse did not meet the genuineness requirements of subsection 4(1)(b) of the

Regulations. The Panel's conclusion is supported by the record and it was open to the Panel to determine that the myriad of negative factors outweighed the positive factors, including that the Applicant and his spouse had a child together.

A. *Preliminary Issue: Reply Memorandum*

[16] The Applicant has adopted his Reply Memorandum into his Further Memorandum of Argument, which I find to be admissible and will be considered by this Court. I do not find this is inconsistent with the Court's leave order, where the Applicant has expressly and clearly adopted the content of the pre-leave reply into his further post-leave submissions.

B. *Did the Panel Breach the Duty of Procedural Fairness?*

[17] The Applicant alleges that the Panel breached the duty of procedural fairness by not putting one specific inconsistency between his testimony and that of his spouse to him, which concerned whether he was in Canada or Pakistan when he found out his spouse was pregnant.

Paragraph 11 of the Decision provides:

[11] The Appellant and the Applicant testified that they have maintained contact and communication with each other regularly since they met. Nonetheless, there were many instances where the Appellant's and the Applicant's responses were inconsistent, or there were internal contradictions, in important areas that would not be expected if they were in a genuine spousal relationship with the extent of alleged contact and communication. For example, there were inconsistencies concerning when the Appellant visited the Applicant. While the Applicant testified that the Appellant was present when she found out that she was pregnant, the Appellant testified that he had already returned to Canada. There was also inconsistent testimony concerning when the Appellant visited after

the birth of their child, and how frequently they communicated with one another.

[18] The Panel is able to assess credibility on the basis of such inconsistencies. The testimony of the Applicant and his spouse was put in through direct examination by counsel. I cannot find that the Panel breached its duty of procedural fairness for failing to canvass this specific issue. The Applicant and his counsel held the primary responsibility for identifying a proper line of questioning and ensuring that inconsistencies in the evidence were explained.

C. *Is the Decision Reasonable?*

[19] The Decision is unreasonable. The Panel failed to engage in a meaningful way with the evidence related to the child of the marriage (*Zhou*, above at para 55). The Panel made unreasonable factual and credibility findings, further undermining its conclusion.

[20] A reasonable decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility. The Decision must further be internally coherent and justified in relation to the relevant factual and legal constraints that bear upon the decision (*Vavilov*, above at paras 99, 101, 105). A reviewing Court must be satisfied that there is a line of analysis within the given reasons that could lead the decision maker from the evidence to its conclusion (*Vavilov* at para 102).

[21] In *Gill v Canada (Citizenship and Immigration)*, 2010 FC 122 [*Gill*], the Federal Court held that when examining the genuineness of a marriage, “[t]he subsequent birth of a child would ordinarily be sufficient to dispel any lingering concern...” (*Gill*, above at paras 8, 9):

[8] The Board was correct in acknowledging that, in the assessment of the legitimacy of a marriage, great weight must be attributed to the birth of a child. Where there is no question about paternity, it would not be unreasonable to apply an evidentiary presumption in favour of the genuineness of such a marriage. There are many reasons for affording great significance to such an event not the least of which is that the parties to a fraudulent marriage are unlikely to risk the lifetime responsibilities associated with raising a child. Such a concern is heightened in a situation like this where the parents are persons of very modest means.

[9] In its assessment of this marriage, the Board noted that “strong countervailing evidence” would be required to displace the significance of the birth of the child. The problem with the decision is that the Board’s assessment of that “strong countervailing evidence” largely concerned trivial, inconclusive or irrelevant matters and ignored considerable evidence which contradicted its conclusion.

[22] As it relates to the birth of the Applicant and his spouse’s daughter in this case, the Panel found:

[18] The Appellant and the Applicant have a child together and I have taken considerable time to consider this evidence. I am well aware that the implications can be devastating if a couple’s appeal is dismissed when they have brought children into that relationship. While credible evidence of a child of a relationship is generally indicia of a genuine relationship, it is not determinative of the genuineness of the relationship. In this instance, the birth of a child does not outweigh the numerous concerns with the evidence presented.

[23] While a child of the marriage is not determinative of marriage genuineness, it must be afforded significant weight (*Gill* at paras 8, 9; *Mutneja v Canada (Citizenship and Immigration)*),

2019 FC 1624 at para 22 [*Mutneja*]; *Chen v Canada (Citizenship and Immigration)*, 2016 FC 61 at paras 20-23). This Court has even described evidence of a child of the marriage as constituting “an *evidentiary presumption* in favour of genuineness” (*Mutneja*, above at para 21) [*Emphasis added*].

[24] Strong, countervailing evidence is required to displace the significance of this factor (*Gill* at para 9). Therefore, the Panel’s bald statement that the presence of a child of the marriage was outweighed by other negative factors is insufficient. The Federal Court in *Mutneja* provides (*Mutneja* at para 22):

[22] While the birth of a child is not conclusive evidence of the genuineness of a relationship, the IAD was obliged to weigh the fact that the Applicant and Ms. Mutneja have a child together and give this factor considerable weight. And yet, the Decision does not disclose any analysis of this factor. The IAD baldly states that “the birth of a child does not outweigh the numerous concerns with the evidence presented.” The failure to explain why this important factor was outweighed by negative ones leads to the inference this factor was not properly considered.

[25] The Panel further failed to provide due consideration to the circumstances of the marriage and the Applicant’s medical condition in finding various inconsistencies between the testimony of the Applicant and his spouse. In such circumstances, the Panel has “...cherry picked weaknesses in the Applicant’s testimony which simply does not hold water when one considers all the circumstances, including the education, sophistication, and cultural backdrop” (*Dang v Canada (Citizenship and Immigration)*, 2014 FC 1195 at para 74). Failing to deal with the positive, consistent evidence of the Applicant in the Panel’s analysis undermines the transparency, intelligibility and justifiability of the Decision.

[26] For example, the Panel faults the Applicant's spouse for not knowing the specifics of the Applicant's medical condition, including the medication taken by the Applicant. This places an unreasonable knowledge requirement upon the spouse, considering the circumstances of the arranged marriage, very limited education of the spouse and the distance between the spouses, and in light of the evidence that the Applicant does not share such details out of concern for causing stress.

[27] Further, the spouses were arranged to be married as children and it is reasonable that the Applicant's spouse could not remember exactly when she was engaged, contrary to the finding of the Panel.

[28] While assessments of credibility are part of the Panel's fact-finding process, they are not immune from review and must be clearly articulated and justified by the evidence (*Kusi v Canada (Citizenship and Immigration)*, 2021 FC 68 at paras 20-21). The Panel stated significant gaps, discrepancies and inconsistencies exist in the evidence, which the Panel's selected examples fail to reasonably substantiate.

[29] As one example, the Panel broadly states that testimony regarding the lost photographic evidence differed between the Applicant and his spouse, where the record indicates significant consistencies between the narratives of the Applicant and his spouse, with the photographs being lost by the Applicant at the airport.

[30] This finding, along with the examples outlined above, and particularly the failure to explain why the child of the marriage is outweighed by the negative factors, leads to the inference that this factor was not properly considered, and renders the Decision unreasonable.

VIII. Conclusion

[31] For the reasons above, this Application is granted and remitted to a different Panel of the Immigration Appeal Division for reconsideration.

[32] No costs are awarded.

JUDGMENT in IMM-2984-20

THIS COURT'S JUDGMENT is that:

1. The Application is granted;
2. The matter is remitted to a different Panel of the Immigration Appeal Division for reconsideration;
3. No costs are awarded; and
4. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2984-20

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