Federal Court Cour fédérale

**Date: 20221101**

**Docket: IMM-3069-21**

**Citation: 2022 FC 1490**

**Ottawa, Ontario, November 1, 2022**

**PRESENT: Mr. Justice Norris**

**BETWEEN:**

**JOSE RENNE MENJIVAR MELGAR**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. OVERVIEW

[1] Jose Renne Menjivar Melgar, the applicant, was born in El Salvador in December 1983. He entered Canada in January 2004 and made a claim for refugee protection. The claim was rejected in September 2004. The applicant then submitted an application for a pre-removal risk assessment ("PRRA"). On May 11, 2005, he was notified that the PRRA application had been

refused. Three days later, the applicant married Jose Prado in Toronto. Two weeks after the wedding, the applicant was removed from Canada to El Salvador.

[2] In December 2005, Mr. Prado sponsored the applicant for permanent residence in Canada. Despite some concerns arising from a tip received by Citizenship and Immigration Canada that the marriage was one of convenience, the sponsorship application was ultimately successful. In October 2007, the applicant returned to Canada and was granted permanent resident status. According to the applicant, he and Mr. Prado lived together in Toronto.

[3] Mr. Prado was a person of some renown in Toronto's Hispanic community because, despite having lost both his arms in an industrial accident in his native Colombia, he was very active in the community and at a local evangelical church. He had a program on a community radio station and was an inspirational figure for many.

[4] In February 2008, Mr. Prado was charged with importing 800 grams of heroin when he returned to Canada from a trip to Colombia. He and the applicant were divorced in October 2009. The divorce application filed by Mr. Prado states that the two had separated on June 1, 2008. According to the applicant, he ended the relationship because of Mr. Prado's lifestyle, including the latter's involvement with drugs.

[5] In December 2009, the applicant married Ada Maria Ayala de Menjivar (nee Ada Maria Ayala Angel) in El Salvador. The two had known each other since childhood but a deeper friendship developed after the applicant returned to El Salvador in 2005 and continued after he

returned to Canada in 2007. Eventually, it became a romantic relationship. As will be seen below, when this happened was a live issue in this case. According to the applicant, Ms. Ayala de Menjivar was the first woman he had been attracted to romantically. Until then, all his romantic attractions had been to men.

[6] In August 2014, Ms. Ayala de Menjivar was granted permanent resident status in Canada under the applicant's sponsorship. Their son Renne was born in Canada in May 2019.

[7] In December 2015, an Immigration Officer prepared a report under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*") alleging that the applicant is inadmissible to Canada under paragraph 40(1)(a) of that Act. Specifically, the Officer alleged that the applicant had engaged in misrepresentation by failing to disclose the true nature of his marriage to Mr. Prado in his application for permanent residence – namely, that it was a marriage of convenience he had entered into for the purpose of obtaining status in Canada.

[8] The allegation of inadmissibility on grounds of misrepresentation was referred to the Immigration Division ("ID") of the Immigration and Refugee Board of Canada ("IRB") for a hearing. This hearing took place over nine sessions between June 2017 and November 2018.

[9] In a decision dated February 13, 2019, the ID member concluded that the applicant is inadmissible under paragraph 40(1)(a) of the *IRPA* because he had misrepresented the true nature of his marriage with Mr. Prado. The member issued an exclusion order against the applicant.

[10] The applicant appealed this determination to the Immigration Appeal Division ("IAD") of the IRB. He argued that the ID had erred in concluding that he had engaged in misrepresentation. He also submitted that the IAD should allow the appeal on humanitarian and compassionate ("H&C") grounds under paragraph 67(1)(c) of the *IRPA* given his establishment in Canada, the hardship he would face in El Salvador, and the best interests of his Canadian born child.

[11] Following a two day hearing, the IAD dismissed the appeal in a decision dated April 15, 2021. The IAD member found that the applicant had engaged in misrepresentation and that the removal order issued by the ID was therefore valid. The member also found that there were insufficient H&C considerations to warrant allowing the appeal under paragraph 67(1)(c) of the *IRPA* considering the seriousness of the applicant's misrepresentation and his lack of remorse for his actions.

[12] The applicant now applies for judicial review of the IAD's decision under subsection 72(1) of the *IRPA*. He contends that the IAD's determinations with respect to the validity of the removal order and with respect to his request for special relief on H&C grounds are both unreasonable.

[13] As I will explain in the reasons that follow, I do not agree that the decision to uphold the removal order is unreasonable; however, I do agree that the IAD's assessment of the applicant's request for special relief on H&C grounds is unreasonable. This application must, therefore, be allowed and the matter remitted for redetermination by a different decision maker.

[14] Since the applicant has not established any reviewable errors in the decision upholding the validity of the removal order, the redetermination will be limited to the question of whether his appeal should be allowed under paragraph 67(1)(c) of the *IRPA*.

## II. BACKGROUND

### A. *The Decision of the Immigration Division*

[15] The applicant's position before the ID was that he had not engaged in misrepresentation with respect to his marriage to Mr. Prado because it was not a marriage of convenience; rather, it was genuine and had not been entered into for the purpose of obtaining status in Canada. The applicant testified at the hearing before the ID, as did Ms. Ayala de Menjivar.

[16] The ID member found that there were valid reasons to doubt the credibility and trustworthiness of the testimony of the applicant and Ms. Ayala de Menjivar and, as a result, gave their testimony little weight. On the other hand, the member found that information in various documentary exhibits (including immigration applications and interview notes) relating to the applicant's relationship with Mr. Prado was credible and trustworthy and would be given "full weight."

[17] The ID member found that the applicant's testimony was not credible for two main reasons: first, it was inconsistent with other accounts the applicant and Ms. Ayala de Menjivar had provided to immigration authorities at other times about the former's relationship with Mr. Prado; and second, the genuineness of the relationship was belied by the applicant's lack of

knowledge of Mr. Prado and of many details of their relationship as well as by Ms. Ayala de Menjivar's account of the development of her own relationship with the applicant at a time when he was being sponsored by Mr. Prado.

[18] The ID member concluded that the applicant's marriage to Mr. Prado was not a genuine one but, rather, "was simply a façade." By not informing Canadian immigration authorities that the marriage was not genuine and that it had been entered into for the purpose of obtaining legal status in Canada, the applicant had "directly misrepresented and withheld material facts, as spousal sponsorship requires a genuine relationship." Accordingly, the member found the applicant to be inadmissible under paragraph 40(1)(a) of the *IRPA* and issued an exclusion order.

B. *The Appeal to the Immigration Appeal Division*

[19] As a permanent resident, under subsection 63(3) of the *IRPA*, the applicant could appeal the exclusion order made against him by the ID to the IAD. Section 67 of the *IRPA* provides as follows regarding that appeal:

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| **67 (1)** To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of, | **67 (1)** Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé : |
| **(a)** the decision appealed is wrong in law or fact or mixed law and fact; | **a)** la décision attaquée est erronée en droit, en fait ou en droit et en fait; |
| **(b)** a principle of natural justice has not been observed; or | **b)** il y a eu manquement à un principe de justice naturelle; |

| | |
|---|---|
| **(c)** other than in the case of an appeal by the Minister, taking into account the best interests 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. | **c)** sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales. |
| **(2)** If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration. | **(2)** La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente. |

[20] The applicant argued under paragraph 67(1)(a) of the *IRPA* that the ID had erred in concluding that he had engaged in misrepresentation. He maintained his position that the marriage to Mr. Prado was genuine and had not been entered into for the purpose of obtaining status in Canada. The applicant also argued that the appeal should be allowed on the basis of H&C considerations under paragraph 67(1)(c) of the *IRPA*.

[21] Both the applicant and Ms. Ayala de Menjivar testified again at the hearing before the IAD. The applicant also filed a substantial amount of documentary evidence to demonstrate his establishment in Canada and to support his submissions concerning the hardship he would experience in El Salvador and the best interests of his child.

## III. DECISION UNDER REVIEW

### A. *The Validity of the Removal Order*

[22] The ID member had found that significant discrepancies in the evidence raised serious concerns about the applicant's credibility. The IAD member found that the applicant's evidence on appeal did little to clear up the credibility issues identified by the ID. There remained material inconsistencies between the applicant's testimony and other accounts of his relationship with Mr. Prado. As well, the IAD member found that the applicant continued to lack knowledge of details about Mr. Prado and about their relationship that it would be reasonable to expect him to know if they had been in a genuine marriage. The member also found that aspects of the applicant's account of his relationship with Mr. Prado simply did not make sense. Further, the applicant had not produced any evidence to corroborate his claim that he and Mr. Prado had lived together as a married couple.

[23] The IAD member concluded as follows regarding the applicant's relationship with Mr. Prado:

> I am willing to believe that at some point, perhaps in 2004 to 2005, the Appellant may have been in a romantic relationship with Mr. Prado and they may have resided together for a period. The Appellant provided photos of the two of them together. However, there is not enough evidence to make a finding in this regard. The focus of this hearing is their marriage. The Appellant has been unable to give consistent evidence regarding what should be memorable events surrounding a marriage: the place where a proposal was made, the attendees at the wedding itself, the place of any celebration following and the date of separation. Therefore, I find it more likely than not that the Appellant, who was under a deportation order at this time and whose Pre-Removal Risk Assessment application had been refused, entered into this

> marriage primarily to obtain status and privilege in Canada. The removal order issued by the ID is therefore valid.

B. *The Request for Special Relief*

[24] The IAD member next considered whether, having regard to all the circumstances, including the best interests of the applicant's child, the appeal should be allowed under paragraph 67(1)(c) of the *IRPA* because special relief from the requirement to leave Canada was warranted.

[25] Citing *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 at para 11, the member began by noting that, in a misrepresentation case, the *Ribic* factors that guide determinations under paragraph 67(1)(c) (stemming from *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No. 4 (QL)) are modified slightly. In summary, they are the following: (a) the seriousness of the misrepresentation and the circumstances surrounding it; (b) the remorsefulness of the appellant; (c) the length of time spent in Canada and the appellant's establishment here; (d) family members in Canada, and the impact of removal on them; (e) the best interests of any child directly affected; (f) the family and community support available to the appellant; and (g) the degree of hardship caused by removal, including conditions in the likely country of removal. The IAD member noted that this is not an exhaustive list of potentially relevant factors (although he did not consider any additional factors in this case).

[26] The IAD member also noted that a decision under paragraph 67(1)(c) is an exercise of discretion in which the weight of the relevant factors must be determined in the circumstances of

the case at hand. This discretion must be exercised consistently with the objectives of the *IRPA*, which include "maintaining the integrity of the immigration system in the face of misrepresentations made by potential immigrants."

[27] In summary, the IAD assessed the relevant considerations as follows:

A. **Seriousness of the misrepresentation:** The misrepresentation is very serious. It involved the applicant deliberately misleading immigration authorities. There is no doubt that this led to an error in the administration of the *IRPA*.

B. **Remorse:** The applicant displayed no remorse and maintained that his marriage to Mr. Prado was genuine. The applicant "might have done better" to admit that the marriage was a marriage of convenience.

C. **Establishment in Canada:** The applicant is well-established and this is a positive factor in the appeal. The applicant arrived in Canada at the age of 20 and has spent the majority of his adult life here. He owns and operates a roofing business with four employees with the help of his wife. Together the couple own a home and have a significant amount of savings.

D. **Impact on family members in Canada:** If the appeal is dismissed, both the applicant and his wife will be deemed inadmissible. (Ms. Ayala de Menjivar would be inadmissible for misrepresentation for having been sponsored by a person who is determined to be inadmissible for misrepresentation: see *IRPA*, paragraph 40(1)(b).) Given that the applicant's son is a young child, he "will have no choice but to go with his parents" to El Salvador.

E. **Best interests of the child:** The applicant's son is two years old and is a Canadian citizen. The best interests of this child are only a slight positive factor in the appeal. The age of the applicant's son limits the impact of the return to El Salvador. The applicant provided evidence of poor education, expensive health care, and risk of gang recruitment in El Salvador. Although the child's interests may be better served in Canada as he gets older, this is "somewhat, but not entirely, speculative." As well, the applicant can also apply to return to Canada after five years, although there is no guarantee that the application will be successful. In the long term, the interests of the applicant's son "would probably be better served in Canada." However, at the present time, given the child's age, "the relocation will have little impact on his interests."

F. **Family and community support:** The applicant is not close with his family in El Salvador. The applicant's wife has no immediate family there apart from her mother. Nevertheless, they are not completely without support there.

G. **Hardship on removal:** Three areas of concern were raised in respect of the applicant and his family's removal to El Salvador. Nonetheless, any hardship he or his family may face will be of a temporary nature and weighs only slightly as a positive factor on the appeal.

    i. **Gang violence:** The applicant's testimony and country evidence establish that gang violence is a problem in El Salvador. However, neither the applicant nor his family members have been recruited by a gang, though family members have been forced to pay extortion money to the MS-13 gang. The applicant and his family may face a slightly increased risk of violent crime due to their status as returnees from North America.

ii. **Sexual Orientation:** The applicant is unlikely to be targeted in El Salvador because of his bisexuality. He is in a stable heterosexual marriage with which he is satisfied. He also lived in El Salvador for two years between 2005 and 2007 without experiencing any problems. Unless he enters into a relationship with a man, it is unlikely that he will be identified as bisexual in El Salvador.

iii. **Economic Hardship:** Economic conditions in El Salvador are very poor. Any hardship visited on the applicant will be connected to the loss of his Canadian business; however, the applicant will have significant funds from the sale of his assets and this would ameliorate any economic hardship he and his family might face in El Salvador.

[28] Balancing all of these considerations, the IAD member concluded that the favourable considerations did not outweigh the seriousness of the misrepresentation and the applicant's lack of remorse. Consequently, the member concluded that there were insufficient H&C considerations to warrant the granting of special relief and, thus, no basis on which to allow the appeal under paragraph 67(1)(c) of the *IRPA*. The IAD dismissed the appeal accordingly.

## IV. STANDARD OF REVIEW

[29] The parties agree, as do I, that the IAD's decision is to be reviewed on a reasonableness standard: see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 57-59. That this is the appropriate standard has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10.

[30] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances: see *Vavilov* at para 125. Discretionary determinations such as the one at issue here are entitled to particular deference from the reviewing court. At the same time, reasonableness review is not a rubber-stamping process; it remains a robust form of review: see *Vavilov* at para 13.

[31] The onus is on the applicant to demonstrate that the IAD's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

## V. ANALYSIS

[32] The applicant challenges the reasonableness of the IAD's conclusion that the removal order is valid as well as its determination that special relief was not warranted. As I have already stated, I am not persuaded that the decision to uphold the removal order is unreasonable. However, I do agree that the decision that special relief was not warranted is unreasonable, although not for all the reasons advanced by the applicant.

### A. *The Validity of the Removal Order*

[33] The applicant contends that the decision upholding the removal order is unreasonable because the IAD misapprehended the evidence in material respects. I do not agree.

[34] The applicant submits that the IAD's conclusion that he had given inconsistent accounts of what happened when he returned to Canada in October 2007 is erroneous because the evidence the member relies on to demonstrate the inconsistency actually relates to events that occurred the following year. The respondent agrees that the member misapprehended the evidence in this respect. However, the respondent submits that this error is immaterial because the IAD identified numerous other inconsistencies in the applicant's accounts that have not been challenged.

[35] I agree with the respondent. The conflation of events in 2007 and 2008 could not possibly have affected the result given all the other inconsistencies in the applicant's accounts of his marriage that the member identified and that have not been challenged on this application.

[36] The applicant also contends that the IAD erred in its assessment of Ms. Ayala de Menjivar's evidence concerning the development of her relationship with the applicant. Some additional background is necessary to put this issue in context.

[37] According to the interviewer's notes of her sponsorship interview in March 2014 (which was conducted with the assistance of a Spanish interpreter), Ms. Ayala de Menjivar confirmed that the applicant was already in a relationship with her when he landed in Canada in October 2007. She was then asked the following question and gave the following answer:

> Q. And he still went to live with his spouse in Canada?
>
> A. As far as I understand when he landed in Canada his husband was waiting for him at the airport and then he went to live with him. It was nothing formal it was just a relationship of friends with benefits.

[38] At both the ID and IAD hearings, Ms. Ayala de Menjivar testified that when she stated that she and the applicant were in a relationship in October 2007, she did not mean a romantic relationship; they were just very good friends. The applicant described their relationship at that time in the same way. Ms. Ayala de Menjivar also testified that the questions and answers in the sponsorship interview had been transcribed incorrectly. She had actually been asked another question about her relationship with the applicant (which is omitted from the notes) and this is what she was responding to when she stated that the relationship was "nothing formal" and "just a relationship of friends with benefits." Contrary to what the notes suggest, she was not referring to the applicant's relationship with Mr. Prado. Further, she explained that what she meant was that her relationship with the applicant was a very close friendship. She did not say anything in Spanish that would imply that at that time it involved anything sexual (as the English phrase

"friends with benefits" does). She reiterated that there was nothing sexual about her relationship with the applicant at that time. The applicant also confirmed that he and Ms. Ayala de Menjivar did not yet have a sexual relationship when he returned to Canada in October 2007.

[39] The IAD states the following about this evidence:

> [Ms. Ayala de Menjivar] also stated [in her sponsorship interview] that the Appellant's relationship with Mr. Prado was more of a "friends with benefits" relationship. Her explanation for this was that she was referring to the relationship between the Appellant and herself. This does not make sense as the Appellant and his wife both testified that they did not have sexual relations until after their wedding. This casts more doubt as to the nature of the Appellant's first marriage.

[40] I agree with the applicant that the IAD appears to have overlooked the evidence that Ms. Ayala de Menjivar did not intend to characterize her relationship with the applicant in October 2007 as a sexual one and that she did not say anything in Spanish that would have the same sexual implications as the English expression "friends with benefits." If that evidence is accepted, there would be no basis to conclude, as the IAD did, that Ms. Ayala de Menjivar cannot have been referring to her own relationship with the applicant (because "friends with benefits" implies a sexual relationship, which Ms. Ayala de Menjivar says she did not have with the applicant at that time); rather, she must be referring to the applicant's relationship with Mr. Prado. The problem, however, is that the IAD member does not addresses this evidence in the decision nor, assuming the member did reject it, does he give any reasons for doing so. Consequently, the member's determination that Ms. Ayala de Menjivar's comment "casts more doubt" as to the nature of the applicant's marriage to Mr. Prado is lacking justification, transparency and intelligibility.

[41] While I agree with the applicant that this leaves a gap in the IAD member's reasoning and calls the reasonableness of this particular determination into question, I do not agree that this undermines the reasonableness of the decision as a whole. Even if the member should not have simply presumed that Ms. Ayala de Menjivar had used an expression in Spanish that, like the English expression "friends with benefits," had a sexual connotation and, further, should not have concluded that she must have been referring to the applicant's relationship with Mr. Prado (as the interview notes suggest), this flaw is immaterial given all the other evidence casting doubt on the nature of the applicant's marriage to Mr. Prado. Importantly, there is no basis to find that the IAD attributed particular significance to this evidence; it simply raised "more doubt" about the nature of the applicant's marriage to Mr. Prado. Doubts about the genuineness of the marriage are reasonably supported by a great deal of other evidence besides this.

[42] Finally, the applicant submits that the IAD member erred by making implausibility findings that do not meet the "clearest of cases" threshold established in the jurisprudence: see *Zaiter v Canada (Citizenship and Immigration)*, 2019 FC 908 at paras 8-11 and the cases discussed therein; see also *Lozano Pulido v Canada (Citizenship and Immigration)*, 2007 FC 209 at para 37.

[43] I do not agree that this principle is applicable here. The member was not assessing what could reasonably be expected to have happened in light of common sense or common experience, an exercise that calls for particular caution; rather, he was concerned with the internal logic of the applicant's account. The member reasonably found the internal logic of the

account to be wanting in material respects and on that basis (among others) drew an adverse inference about the applicant's credibility. There is no basis to interfere with that determination.

[44] For these reasons, I am not persuaded that the IAD's decision to uphold the removal order is unreasonable.

B. *The Request for Special Relief*

[45] The applicant submits that the IAD fell into reviewable error in three respects in its treatment of H&C considerations under paragraph 67(1)(c) of the *IRPA*: (1) in the assessment of the hardships the applicant would face in El Salvador; (2) in the treatment of the absence of remorse on the part of the applicant for his misconduct; and (3) in the assessment of the best interests of the applicant's child. As I will explain, I do not agree that the IAD erred in the first respect but I do agree that it erred in the other two respects.

(1) Hardship in El Salvador

[46] The applicant submits that the IAD's assessment of the hardship he would face in El Salvador is unreasonable. In particular, he submits that the IAD member assessed the risks posed by criminal gangs unreasonably. He also contends that the member unreasonably expected him to conceal his identity as a bisexual man. I do not agree.

[47] The IAD member accepted that gang violence is a problem in El Salvador. The member also accepted that deportees from North America could be perceived as having money and

therefore can become targets for extortion. The member accepted the applicant's evidence that he had been targeted for extortion in the past, as had his mother-in-law. On this basis, the member found that there was a "slightly increased risk" that the applicant or his family would be the victims of violent crime if they returned to El Salvador. The member simply did not agree that the degree of risk from criminal gangs was as great as the applicant had contended. That determination is not unreasonable. The applicant's arguments on this application effectively ask the Court to reweigh the evidence and reach a different conclusion. This is not the Court's proper function on judicial review.

[48] The IAD dealt with the risks to the applicant as a bisexual man as follows:

> I find that the likelihood of the Appellant being targeted in El Salvador because of his bisexuality to be low for several reasons. The Appellant is in a heterosexual marriage which appears to be stable. He testified that he is satisfied with this marriage. The Appellant returned to El Salvador in February 2005 and lived with his parents for two and a half years. He was employed during part of this period. He gave no evidence that he was harassed or targeted because of his sexuality during this period. Unless he engages in a relationship with a man, I find it unlikely that the Appellant will be identified as bisexual in El Salvador and be subject to harassment or violence.

[49] In my view, this is a reasonable assessment of the evidence before the IAD. It was not unreasonable for the member to conclude that, given the current circumstances of the applicant's life, there was little risk he would be targeted for being bisexual. I do not agree with the applicant that the IAD effectively required him to conceal his sexual identity. Had it done so, this would have been a reviewable error: see *Atta Fosu v Canada (Citizenship and Immigration)*, 2008 FC 1135 at para 17, and *VS v Canada (Citizenship and Immigration)*, 2015 FC 1150 at para 7. Instead, the IAD member accepted that, on the applicant's own account, this aspect of

his sexual identity is not a significant or overt part of his life as he is now living it and on this basis found that the risk of being targeted for this reason is therefore low. More particularly, the member did not suggest that the applicant should not engage in a relationship with a man; rather, the member accepted the applicant's evidence that suggested there was little if any likelihood that he would do so. This was a reasonable determination in the circumstances of this case.

(2) The applicant's lack of remorse

[50] The applicant submits that the IAD's treatment of his failure to admit his wrongdoing and express remorse for it is unreasonable. I agree.

[51] A sincere expression of remorse can demonstrate a wrongdoer's acceptance of responsibility for their misconduct and its harmful effects. This can be an important mitigating circumstance when it comes to determining what consequences should be imposed for the misconduct because it can reflect positively on the wrongdoer's character and prospects for rehabilitation.

[52] These ideas are well-established in the criminal law. As the Court of Appeal for Ontario explains in *R v Reeve*, 2020 ONCA 381 at para 11:

> A genuine expression of remorse can constitute an important mitigating consideration at the time of sentencing. When an offender demonstrates, through actions and/or words, that he or she is genuinely remorseful for his or her conduct, it can show that the offender has some insight into his or her past actions and takes responsibility for them. Taking responsibility for past conduct is an important step toward rehabilitation and gives cause for hope that the offender may be set on a path of change. The greater the

> genuine insight into past offending behaviour, the greater the cause for hope.

[53] It is equally well-established that, under paragraph 67(1)(c) of the *IRPA*, evidence of remorse and the possibility of rehabilitation can be relevant considerations when determining whether an individual facing removal from Canada should be allowed to remain here: see *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at paras 40, 41 and 90, and *Khosa* at paras 7 and 64-66, where the Court discusses the *Ribic* factors.

[54] Concerns about rehabilitation are often central in cases of inadmissibility based on criminality given the overarching objective of protecting public health and safety and maintaining the security of Canadian society: see *IRPA*, paragraph 3(1)(h). Indeed, one of the *Ribic* factors is the possibility of rehabilitation: see *Khosa* at para 7. While in misrepresentation cases this factor has been modified to refer to the remorsefulness of the party for having engaged in the misrepresentation as opposed to the possibility of rehabilitation (see *Wang* at para 11), I see this simply as a change in emphasis given the close connection between a party's prospects for rehabilitation and their remorsefulness. The language of rehabilitation may be more suited to the criminal context but whether the issue is inadmissibility due to criminality or due to misrepresentation, evidence that the conduct that led to the finding of inadmissibility is not likely to be repeated can be a favourable consideration in a request for special relief.

[55] Even apart from the question of whether there is a risk that the wrongful conduct will be repeated, remorse can also be relevant in a broader sense. Evidence of genuine contrition and acceptance of responsibility for one's wrongdoing can add support – sometimes significant

support – to the argument that the offending party's removal from Canada is not a proportionate step that is necessary to protect the integrity of the immigration system. As the Court emphasizes in *Khosa*, the weight to be given to evidence of remorse and the prospects for rehabilitation in determining whether special relief is warranted under paragraph 67(1)(c) of the *IRPA* must be assessed "in light of all the circumstances of the case" (at para 66).

[56] When remorse is expressed through an admission of the wrongful conduct – for example, in the criminal context, by a guilty plea – this can have additional beneficial effects (e.g. saving the public resources that would otherwise have had to be expended to prove the misconduct and relieving witnesses of the burden of having to testify). These can also constitute important mitigating circumstances: see *R v Anthony-Cook*, 2016 SCC 43 at paras 39-40.

[57] Thus, it is clear that admitting one's wrongdoing and being remorseful can make things better for a wrongdoer when it comes to determining the legal consequences of that wrongdoing. But can the absence of these things make things worse?

[58] In the criminal context, it is an error in principle to treat a failure to plead guilty and the absence of remorse as aggravating factors (as opposed to the absence of mitigating factors). Even after a guilty verdict, "an accused is entitled to maintain his or her innocence and cannot be punished for maintaining that stance" (*Reeve* at para 12). However, as the Federal Court of Appeal explains in *Chung v Canada (Citizenship and Immigration)*, 2017 FCA 68, these principles cannot simply be transposed into the immigration context because, in the criminal context, they are grounded in the presumption of innocence and this presumption is inapplicable

in the immigration context: see *Chung* at para 20. That being said, the decision maker's treatment of evidence of remorse under paragraph 67(1)(c) of the *IRPA* must still be reasonable in light of the particular circumstances of the case: see *Khosa* at paras 66-67 and *Chung* at para 24.

[59] In the present case, the IAD member found that the applicant had not demonstrated remorse "because he maintained, throughout this appeal, that his marriage to Mr. Prado was genuine." According to the member, the applicant "might have done better to admit that his marriage to Mr. Prado was a marriage of convenience and not waste this Division's time with a hearing that necessitated two sittings." In the IAD's view, the applicant's "insistence that his first marriage was genuine and his lack of remorse is not a factor in his favour."

[60] The member returned to these points in his overall conclusion, stating:

> I found the Appellant's misrepresentation to be of a serious nature. The Appellant entered into what was clearly a marriage of convenience in order to obtain status in Canada. He continued to insist that this marriage is genuine, despite unexplained inconsistencies in the accounts of the events that led to the marriage and the circumstances after. Accordingly, he has shown no remorse in misleading Canadian immigration authorities in order to gain status in Canada. He wasted the time and resources of the ID and the IAD in maintaining that his first marriage was genuine.
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> . . .
>
> The humanitarian and compassionate factors in this appeal do not outweigh the seriousness of the misrepresentation that allowed the Appellant to obtain status in Canada and his lack of remorse for so doing.

[61] Reading the IAD's decision as a whole, I am satisfied that the member treated the applicant's failure to admit his wrongdoing and his lack of remorse not simply as the absence of mitigating factors but, rather, as aggravating factors weighing heavily against the granting of special relief. In my view, it was unreasonable for the IAD to do so in the particular circumstances of this case. I say this for the following reasons.

[62] First, the member fails to consider that the purpose of the hearing before the ID and, in part, the hearing before the IAD was to determine the genuineness of the applicant's marriage to Mr. Prado. This is the fundamental factual underpinning to the allegation of inadmissibility due to misrepresentation. The underlying facts had not previously been determined by any other tribunal. Unless and until the ID and the IAD determined otherwise, the Minister's claim that the applicant's marriage to Mr. Prado was a marriage of convenience was an unproven allegation. Moreover, and importantly, this was an issue on which the burden of proof lay with the Minister at both the ID and the IAD: see *Yang v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1484 at paras 21-23.

[63] The applicant was entitled to put the Minister to the proof of the allegation that his marriage to Mr. Prado was not genuine and to attempt to answer the Minister's case in accordance with what he presumably believed to be a true account of the underlying facts. He was also entitled to appeal the ID's determination to the IAD, which conducts a *de novo* hearing: see *Castellon Viera v Canada (Citizenship and Immigration)*, 2012 FC 1086 at paras 10-12, and *Verbanov v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 324 at para 26. It was unreasonable for the IAD member to fault the applicant for exercising these legal rights

instead of simply admitting the Minister's allegation that the marriage was not genuine and that he had, therefore, engaged in misrepresentation.

[64] The present case must be distinguished from those where the underlying wrongful conduct has already been established in a separate proceeding – in particular, cases where inadmissibility rests on a finding of guilt after a criminal trial. The Federal Court of Appeal held in *Chung* that, in such cases, it may be reasonable for the IAD to treat the failure to admit and accept responsibility for what had been established beyond a reasonable doubt in a criminal trial as an aggravating factor under paragraph 67(1)(c) of the *IRPA*. That is not the case here.

[65] Second, it was both unreasonable and unwarranted for the IAD member to conclude that the applicant had "wasted the time and resources of the ID and the IAD in maintaining that his first marriage was genuine." No doubt, the proceedings before the ID and the IAD would have been shorter if the applicant had simply admitted that his first marriage was not genuine. However, to repeat, the applicant was entitled to put the Minister to the proof of its case. There is nothing to suggest that in doing so the applicant acted improperly or otherwise abused the process of the ID or the IAD.

[66] Third, as I have discussed elsewhere (see *Idrizi v Canada (Citizenship and Immigration)*, 2019 FC 1187 at para 30), determinations as to the genuineness of a marriage can be exceedingly difficult. There will rarely be direct evidence of an improper purpose. Typically, intent must be inferred from the conduct of the parties and the particular circumstances of the case. As well, evidence that could support the genuineness of a marriage may be lacking even though the

marriage is, in fact, genuine. These challenges distinguish cases like the present one from cases of alleged misrepresentation where the wrongful conduct can be established with direct evidence and the decision maker's task is therefore much more straightforward – for example, a case where there is credible and trustworthy evidence from a university that it never conferred the degree that a party claimed to have received. Here, there is more room for error and, as a result, more room for the applicant to disagree with the Minister's allegations and with the ID's finding regarding his marriage to Mr. Prado. Contrary to the view of the IAD, it was not improper for the applicant to bring that disagreement forward by way of an appeal.

[67] Put another way, as I have found, it was not unreasonable for the IAD to conclude that the applicant's marriage to Mr. Prado was a marriage of convenience. Indeed, it could even be said that, at the end of the day, the Minister had presented a strong case of misrepresentation and that the applicant's case in response suffered from many material weaknesses. However, this does not preclude the reasonable possibility that the applicant was describing his relationship with Mr. Prado truthfully. Even though the IAD member reasonably rejected the applicant's account of his marriage to Mr. Prado, he should not have faulted the applicant for maintaining a position that he presumably believed to be the truth.

[68] In summary, the IAD member reasonably could have found that the applicant had not demonstrated remorse for his wrongdoing. Indeed, on the record before the IAD, it would be unreasonable for the member to have found otherwise. Thus, the member reasonably could have assessed the request for special relief on the basis that a factor that could have weighed positively for the applicant was absent. However, the IAD member went beyond this. He held that the

applicant's failure to admit the Minister's allegation and to show remorse were factors that weighed heavily *against* the request for special relief. In the particular circumstances of this case, this was an unreasonable determination.

(3) The best interests of the applicant's child

[69] Finally, the applicant submits that the IAD member took an unreasonably truncated view of his son's best interests by focusing on his son's young age. I agree.

[70] As the Supreme Court of Canada held in a related context in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75, where the best interests of a child must be considered in making a discretionary determination, for that exercise of discretion to be reasonable, the decision maker "should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them." This does not mean that children's best interests must always outweigh other considerations or that there may not be other reasons for denying relief even when a child's interests are considered in this way. However, the Court continues, "where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable."

[71] The IAD member quotes these principles in the decision but I am not satisfied that he applied them reasonably to the particular circumstances of this case.

[72] The IAD member found that the age of the applicant's son "limits the impact that a return to El Salvador would have" because, whether he is in Canada or not, his needs would continue to be met by his parents. This implies that the change in the child's circumstances entailed by removal from Canada will have little or no impact on his interests. This fails to account for the likely impacts of removal from Canada on the parents' ability to meet their son's needs. As well, given the evidence of conditions in El Salvador, it was unreasonable for the IAD to find that it was "somewhat, but not entirely, speculative" that the child's needs would be better served in Canada as he gets older. At the very least, this issue warranted more careful consideration: see *Augusto v Canada (Citizenship and Immigration)*, 2022 FC 226 at paras 39 and 42. The IAD's approach also erroneously suggests that, the younger the child, the less necessary it is to consider the child's best interests: see *Singh v Canada (Citizenship and Immigration)*, 2019 FC 1633 at para 31.

[73] In light of these flaws in its reasoning, it was unreasonable for the IAD to find that the child's best interests "are only a slight positive factor" in this case.

C. *Remedy*

[74] As I have explained, I am not persuaded that the IAD's determination that the applicant is inadmissible to Canada under paragraph 40(1)(a) of the *IRPA* is unreasonable. On the other hand, I am persuaded that the IAD's determination under paragraph 67(1)(c) of the *IRPA* is flawed in the respects identified above. I am also satisfied that these flaws are sufficiently central to the IAD's determination that special relief was not warranted that this determination cannot withstand review. Consequently, the application for judicial review must be allowed in

this respect. However, in the absence of any reviewable error by the IAD in relation to the finding of misrepresentation, there is no basis to permit the applicant to re-open that issue before the IAD.

[75] Accordingly, pursuant to paragraph 18.1(3)(b) of the *Federal Courts Act*, RSC 1985, c F-7, the matter will be remitted for redetermination by the IAD with the direction that the applicant is bound by the IAD's determination that he is inadmissible due to misrepresentation under paragraph 40(1)(a) of the *IRPA* and that the redetermination is limited to the applicant's entitlement to special relief under paragraph 67(1)(c) of the *IRPA*.

## VI. CONCLUSION

[76] For these reasons, the application for judicial review is allowed and the matter is remitted for redetermination by a different decision maker. This redetermination will be limited to the applicant's entitlement to special relief under paragraph 67(1)(c) of the *IRPA*.

[77] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

**JUDGMENT IN IMM-3069-21**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is allowed.
2. The decision of the Immigration Appeal Division dated April 15, 2021, is set aside and the matter is remitted for redetermination by a different decision maker.
3. Pursuant to paragraph 18.1(3)(b) of the *Federal Courts Act*, the redetermination is limited to the applicant's entitlement to special relief under paragraph 67(1)(c) of the *IRPA.* The applicant is bound by the IAD's determination that he is inadmissible due to misrepresentation under paragraph 40(1)(a) of the *IRPA.*
4. No question of general importance is stated.

"John Norris"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3069-21 |
| **STYLE OF CAUSE:** | JOSE RENNE MENJIVAR MELGAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | MARCH 17, 2022 |
| **JUDGMENT AND REASONS:** | NORRIS J. |
| **DATED:** | NOVEMBER 1, 2022 |

**APPEARANCES:**

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