Federal Court  Cour fédérale

Date: 20230626

Docket: IMM-3303-22

Citation: 2023 FC 892

Ottawa, Ontario, June 26, 2023

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

AMRITPAL SINGH BAINS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of a decision of the Immigration Appeal Division [IAD] upholding the Immigration Division's [ID] determination that the Applicant is inadmissible to Canada for misrepresentation pursuant to s 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] For the reasons that follow, I am dismissing this application.

Background

[3] The Applicant, Amritpal Singh Bains, is a citizen of India. He was found to be inadmissible due to misrepresentation with respect to the genuineness of his marriage to SH.

[4] SH came to Canada as a dependant child on her mother's permanent residence application. Her father had died in 2004. SH's mother was granted permanent residence status in 2005.

[5] The Applicant's and SH's families are related. Following discussions between the families, in December 2006, SH travelled to India where she married the Applicant. They lived in India for several weeks before SH returned to Canada in early 2007. In May 2007, SH applied to sponsor the Applicant to come to Canada. They were both interviewed by a visa officer in October 2007 and the relationship was found to be *bona fide*. Several days later, the Applicant was issued a permanent resident visa. He arrived was landed in Canada on January 13, 2008.

[6] At first, the couple lived together in the home of the Applicant's uncle, Jagir. On January 19, 2008, less than a week after the Applicant arrived in Canada, SH took an overdose of sleeping pills and was hospitalized. The Applicant's evidence is that SH told him that the overdose was due to the stress of studies and work. Conversely, SH's evidence is that she was depressed due to the Applicant's treatment of her since arriving in Canada. On January 21, 2008, SH was discharged from hospital and then stayed at the home of her brother-in-law, Kuldeep, and mother for a short time before moving back in with the Applicant at his uncle's home.

[7] On March 11, 2008, the Applicant returned to India and to his studies there. SH's evidence is that the Applicant returned to India without informing her of his plans. The Applicant's evidence is that SH was aware of his departure. The Applicant returned to Canada on September 8, 2008. The couple never again cohabited.

[8] On August 27, 2008, SH signed a Statutory Declaration which was provided to the Canada Border Services Agency [CBSA]. Among other things, it states that during the three weeks in India following the wedding the Applicant spent very little time with SH. And, within two or three days of his arrival in Canada, he asked to live separately as he was not ready for marriage and had been forced into the marriage by his parents. SH also stated that she believed that the Applicant used her to come to Canada with no intention of living with her as husband and wife, and that he had defrauded her, her family and the Canadian immigration authorities. She subsequently filed an affidavit in this regard sworn on April 19, 2015.

[9] On May 3, 2010, SH filed for divorce, which was granted in April 2011.

[10] SH's sworn statements led to a report on inadmissibility being prepared pursuant to s 44 of the *IRPA*.

[11] The ID held an admissibility hearing in October 2015, and the Applicant was found to be inadmissible for misrepresentation due to the implausibility and unreasonableness of his evidence. The ID found that the Applicant's "evidence concerning his relationship with [SH] and

the breakdown of the relationship not to be plausible and reasonable" and that his evidence was "contradictory, vague and rife with implausibilities".

[12] The Applicant appealed the ID's decision to the IAD, which dismissed the appeal by decision dated November 3, 2017. The IAD found that there were significant credibility concerns in the Applicant's evidence and that he was not credible. The IAD concluded that the marriage was not genuine and was entered into primarily to facilitate his immigration to Canada.

[13] The Applicant sought judicial review of the IAD's decision. Justice Southcott of this Court found the IAD's decision not to be reasonable on one specific point, being that the IAD had failed to consider corroborative third-party evidence which, on its face, appeared to directly contradict an aspect of SH's evidence. Specifically, the evidence of the Applicant's uncle that SH had driven the Applicant to the airport on March 11 2008 (*Bains v. Canada (Immigration, Refugees and Citizenship)*, 2018 FC 659 [*Bains*]). The decision was remitted to the IAD for redetermination.

[14] Following a *de novo* hearing held over 10 days from 2019 to 2021, the IAD determined, by a decision dated March 25, 2022, that the removal order made against the Applicant was valid in law. Further, on a balance of probabilities, that there were insufficient humanitarian and compassionate [H&C] considerations, in all of the circumstances of the case, to justify granting special relief to the Applicant.

Decision Under Review

[15] The IAD's decision is 83 pages and 362 paragraphs in length. It is not necessary to summarize the totality of its analysis here.

[16] However, in my view, the IAD's introductory overview, having first summarized the above procedural history, provides important context and, for that reason, I set it out below:

> [5] There are two issues in this appeal:
>
> > • Was the decision of the ID legally valid?
> >
> > • If it was, in all the circumstances of the case, and taking into account the best interests any children directly affected by this decision, are there sufficient humanitarian and compassionate ("H&C") considerations to warrant special relief to the Appellant?
>
> [6] I had the advantage of hearing testimony from SH in this appeal, along with the Appellant and several witnesses. I will state at the outset that the Appellant, SH and none of the witnesses were credible, for reasons I will discuss in detail below.
>
> [7] Despite my general finding of a lack of credibility on the part of all the witnesses, where there was a conflict in evidence, I prefer SH's evidence as her testimony had the 'ring of truth' regarding important events in the marriage where the Appellant's did not, particularly regarding the events prior to September 2008. Her testimony was more plausible and congruent with common sense than that of the Appellant and his witnesses.
>
> [8] I have been a decision maker for many years, and I cannot recall another case I have had where the testimony of every single witness was so unreliable. This makes my job exceedingly difficult. Indeed, there is a distressing lack of clarity and consistency with the evidence in this appeal. It is for this reason that I choose to rely more upon the contemporaneous objective documentary evidence wherever possible, as I find it to be much more illuminating and less subject to manipulation.

[9] There was a significant amount of evidence filed in this appeal, but there is evidence which is notably absent, consisting primarily of objective evidence of the Appellant making credible and good faith efforts to salvage his marriage after he left for India in March 2008, and evidence showing he was ever committed to the relationship.

[10] In addition, I also conclude that the way people act often sheds more light on their intentions than what they say. In this case, deeds speak more than words.

[11] Further, the version of events advanced by the Appellant and his family members was found to be wholly unbelievable by two other Board Members. As this is a hearing I must make my own assessment of the evidence independent of the assessments made by other Members at the Board. My assessment is based on the evidence adduced in this hearing and submissions made by the parties. However, after hearing from the Appellant and his witnesses, along with SH, and considering the submissions made regarding that evidence, I too, have reached the conclusion that the Appellant is inadmissible for misrepresentation.

[12] The only thing that is clear to me in this appeal, after hearing days of testimony and perusing thousands of pages of evidence, is that the Appellant never intended to enter into a genuine marriage with SH. An examination of what transpired within days after the Appellant's landing in Canada bolsters this finding. SH, by her own testimony, admitted that she tried to take her own life with an overdose of pills because she was so distraught when the Appellant told her he did not want to be married to her within a few days of his landing. There is a rift between families that never existed before, where siblings no longer speak to each other.

[13] Something happened that was significant. SH's explanation of what happened when the Appellant came to Canada makes more sense than the Appellant's version of events and is supported by my assessment of the evidence.

[14] The court directed me to explain which version I prefer, and I prefer SH's version, flawed as it is. This leads me to conclude that while SH believed that her marriage to the Appellant was genuine, the Appellant entered into the marriage with SH primarily for immigration purposes. The Appellant's conduct demonstrates that he pretended to be involved in the marriage at the beginning, but after landing, his efforts were anemic at best.

> [15] The testimony of the Appellant was inconsistent with his previous testimony and his documents, and the testimony of his supporting witnesses was hyperbolic, self-serving, and unreliable.
>
> [16] A holistic view of the evidence and close examination of the Appellant's actions after he landed in Canada leads me to conclude that the Appellant took advantage of SH and her family in order for the Appellant to obtain permanent residence through his marriage to SH. This is a direct misrepresentation. The exclusion order is legally valid.
>
> [17] I also conclude that there are insufficient humanitarian and compassionate considerations present here to warrant special relief to the Appellant. The appeal is dismissed.

Issues and Standard of Review

[17] The Applicant identifies the issues in this matter as whether the IAD erred in its findings or assessments conducted pursuant to each of s 67(1)(a), (b) and (c) of the *IRPA*. These issues all fall under the overarching question of whether the IAD's decision was reasonable.

[18] The parties submit, and I agree, that the standard of review is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 23, 25). On judicial review, the Court "must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

Section 67(1)(a) – Was the decision wrong in law or fact or mixed law and fact?

[19] The parties disagree on the burden of proof. The Applicant asserts that the IAD correctly found that the burden was on the Minister to establish the legal validity of the removal order and that the Applicant is inadmissible for misrepresentation but that the IAD erred in effectively reversing the onus. The Respondent asserts that the IAD erred in finding that the burden rests with the Minister on appeal but, in any event, the IAD properly determined that the Minister met its onus. I have set out the parties positions in greater detail below.

The Applicant's Position

[20] The Applicant submits that the IAD erred in finding that the Minister met its burden of proof. Section 67(1)(a) requires the IAD to conduct a *de novo* review of the original record and newly-adduced evidence, and determine whether or not the removal order is valid in law. The burden of proof falls on the Minister to establish the legal validity of the removal order and that the Applicant is inadmissible for misrepresentation. The Applicant submits that the Respondent did not meet its burden as it did not adduce any reliable evidence to support its positions and, therefore, the IAD inappropriately shifted the burden to the Applicant to prove his innocence. That is, while the IAD agreed with the Applicant that the Minister bears the burden of proof, the IAD did not properly apply the test as it improperly reversed the onus. The Applicant submits that the Respondent's position – that the IAD erred in identifying the Minister as the party bearing the burden of proof, but that the decision was nevertheless reasonable – is unintelligible. It was also advantageous to the Respondent to argue that the IAD erred in its assignment of the burden of proof because SH's "many prior inconsistent statements were indefensible".

The Respondent's Position

[21] The Respondent submits that the IAD erred in its determination that the Minister bore the onus of demonstrating that the Applicant is inadmissible for misrepresentation. Rather, it is the party that appeals to the IAD from the ID that bears the onus, as suggested by the plain meaning of ss 67(1)(a) and (b). If the Minister was successful before the ID, as was the case in this matter, then it is not logical to require the Minister to demonstrate that the ID erred; it is only logical that the party alleging the errors in the ID proceedings be the one that proves those errors.

[22] The fact that the IAD hearing was *de novo* did not alter the Applicant's status when he appeared before the IAD – the ID had found him to be inadmissible. The *de novo* nature of the hearing simply allowed the Applicant to put before the IAD, without restriction, all of the evidence it wished to call and arguments he wished to make. It did not change the fundamental essence of the proceeding as an appeal from the ID in which the Applicant had to convince the IAD to reverse the ID's decision for any of the reasons set out in 67(1) of the IRPA. Further, the IAD relied on but *Yang v Canada (Citizenship and Immigration)*, 2019 FC 1484 [*Yang*] but misread what is at best an ambiguous comment by the Court in that decision. *Yang* relied on *Amergo v Canada (Citizenship and Immigration)*, 2018 FC 996 at paras 1-5 [*Amergo*], which was an appeal by the Minister, in which circumstance it was only appropriate that the burden of proof lay with the Minister. It should not be taken as requiring the Minister to bear the burden of proof at all times. *Hehar v Canada (Citizenship and Immigration)*, 2016 FC 1054 [*Hehar*], also cited in *Yang*, concerned a visa officer's decision to refuse a temporary resident visa application for misrepresentation. There, the Court merely affirmed that in such cases the Minister must

demonstrate that the Applicant misrepresented material facts. The Respondent submits that *Hehar* has no relevance to the question of who bears the burden in an appeal of an ID determination that a permanent resident is inadmissible and where a removal order is issued against them.

Analysis

i. Burden of Proof

[23] Pursuant to s 40(1)(a) of the *IRPA*, a permanent resident or a foreign national is inadmissible for misrepresentation for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of that Act.

[24] Rights of appeal are dealt with in Division 7 of the *IRPA*. Sections 63(3) and (5) address the right to appeal a removal order as well as the right of appeal of the Minister. Sections 66 and 67 concern the disposition of appeals:

> **Right to appeal removal order**
>
> **(3)** A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.
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> …..
>
> **Right of appeal — Minister**
>
> **(5)** The Minister may appeal to the Immigration Appeal Division against a decision of the Immigration Division in an admissibility hearing.

Disposition

66 After considering the appeal of a decision, the Immigration Appeal Division shall

(a) allow the appeal in accordance with section 67;

(b) stay the removal order in accordance with section 68; or

(c) dismiss the appeal in accordance with section 69.

67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

(a) the decision appealed is wrong in law or fact or mixed law and fact;

(b) a principle of natural justice has not been observed; or

(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.

Effect

(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.

[25] The IAD dealt with the issue of the burden of proof as a preliminary matter, setting out the party's respective positions. The IAD quoted paragraph 23 of *Yang* and did not agree with the Respondent that the case was wrongly decided. The IAD noted that in the *de novo* appeal, and to establish that the removal order was valid in law and that the Applicant was inadmissible for misrepresentation, the Minister relied on the evidence contained in the record and evidence filed in the appeal, including the testimony of SH. The IAD found that the onus of proving the misrepresentation was on the Minister and that the Minster had met its onus. Further, once that

finding had been made by the IAD, the onus shifted to the Applicant to show that there were sufficient H&C considerations to warrant special relief, in spite of the misrepresentation.

[26] As stated in *Castellon Viera v Canada (Citizenship and Immigration)*, 2012 FC 1086, which concerned a decision of the IAD finding that the applicant was inadmissible:

> [10] It is now settled that an appeal before the IAD is "a hearing de novo in a broad sense" (*Kahlon v Canada (Minister of Employment and Immigration*), 1989 FCJ No 104, at para 5 [*Kahlon*]; *Mohamed v Canada (Minister of Employment and Immigration)*, [1986] 3 FC 90, at paras 9-13 (CA) [*Mohamed*]; *Singh v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1963, at para 8; *Ni v Canada (Minister of Citizenship and Immigration)*, 2005 FC 241, at para 9; *Canada (Minister of Citizenship and Immigration) v Savard*, 2006 FC 109, at para 16; *Canada (Minister of Citizenship and Immigration) v Venegas*, 2006 FC 929, at para 18; *Contreras Mendoza v Canada (Minister of Citizenship and Immigration)*, 2007 FC 934, at paras 17-20 [*Contreras Mendoza*]).
>
> [11] Accordingly, the IAD is **not limited to** determining whether the Immigration Division correctly or reasonably concluded that a person seeking admission to Canada was of an inadmissible class. **Rather, the IAD is required to determine whether the person is in fact inadmissible** (*Mohamed*, above; *Kahlon*, above; *Contreras Mendoza*, above). Contrary to Mr. Castellon's submissions, there is nothing in the IRPA or the jurisprudence which limits the exercise of *de novo* jurisdiction by the IAD to situations in which new evidence which was not before the Immigration Division has been adduced.
>
> …..
>
> [26] As noted above, the IAD is not limited to determining whether the Immigration Division correctly or reasonably concluded that a person seeking admission to Canada is of an inadmissible class. Rather, the IAD is required to determine whether the person is in fact inadmissible Page: 9 (*Mohamed*, above; *Kahlon*, above; *Contreras Mendoza*, above; *Rattan v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 32, at para 7 [*Rattan*]). **In other words, on an appeal from the Immigration Division, the IAD is in essentially the same position as was the Immigration Division**. In the context of this case, that means that its task was to determine if Mr. Castellon was inadmissible to

> Canada based on the test set forth in paragraph 37(1)(a) of the IRPA, and the rules of interpretation set forth in section 33. Those rules state, in unambiguous terms, that "[t]he facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur."
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> (emphasis added)

[27] In *Kahlon v. Canada (Minister of Employment & Immigration)*, [1989] F.C.J. No. 104, referenced in *Castellon Viera*, the Federal Court of Appeal states at para 5:

> The effect of that decision is, in my opinion, that **the hearing of an appeal by the Immigration Appeal Board is a hearing de novo in a broad sense**. I again agree with the view of Thurlow C.J., expressed in *Mohamed*, at p. 94:
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> > In my opinion *the issue to be decided by the Board on an appeal under section 79 of the Act is* not whether the administrative decision taken by a visa officer to refuse an application because the information before him indicated that a person seeking admission to Canada was of a prohibited class was correctly taken but *the whole question whether, when the appeal is being heard, the person is in fact one of the prohibited class*.
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> (emphasis in italic original; emphasis in bold added)

(See also: *Petinglay v Canada (Citizenship and Immigration)*, 2019 FC 1371 at para 27)

[28] The Federal Court of Appeal has also held that a true *de novo* proceeding is "a proceeding where the second decision-maker starts anew: the record below is not before the appeal body and the original decision is ignored in all respects" (*Huruglica v. Canada (Citizenship and Immigration)*, 2016 FCA 93 at para 79).

[29] Rule 6(1) of the *Immigration Appeal Division Rules*, SOR/2002-230 [*IAD Rules*] in effect when the IAD made the subject decision (the current version of the *IAD Rules* contain similar provisions: *Immigration Appeal Division Rules*, 2022, SOR/2022-277, s. 20(2)) requires the ID to prepare the following for the IAD on appeals of admissibility hearings: (a) a table of contents; (b) the removal order; (c) a transcript of the admissibility hearing; (d) any document accepted as evidence at the admissibility hearing; and (e) any written reasons for the ID's decision to make the removal order.

[30] In light of this jurisprudence and IAD Rule 6(1), it is clear that IAD appeals under s 67 of the *IRPA* are not true *de novo* appeals. Or, put otherwise, they are *de novo* only "in a broad sense". The IAD is empowered to make its own determination and, in doing so, it is not limited to reviewing the ID's reasons and the record that was before the ID. The parties can submit evidence on appeal to the IAD and witnesses can testify and be cross-examined, as was the circumstance when the IAD heard the matter that is now before me.

[31] As to *Yang*, referred to by the IAD, there it was the applicants who appealed to the IAD. The Court found that the onus on appeal lay with the Minister. The applicants in *Yang* argued that the IAD erred with respect to the burden of proof imposed by paragraph 40(1)(a) of the *IRPA*. As in the matter before me, they asserted that the burden of proof had been reversed by the IAD. This Court found that the burden of proof lies on the Minister and rejected the argument that the IAD had reversed that onus, stating:

> [23] I do not dispute that the Minister carries the onus of proving an alleged misrepresentation under paragraph 40(1)(a) of the IRPA (*Canada (Public Safety and Emergency Preparedness) v Amergo*, 2018 FC 996 at para 18; *Hehar v Canada (Citizenship and*

> *Immigration)*, 2016 FC 1054 at para 35). I also acknowledge that, as worded, paragraph 14 of the IAD's Decision could be interpreted as suggesting that the IAD effectively put on the Applicants the onus of demonstrating, on a balance of probabilities, that they did not directly or indirectly misrepresent or withhold material facts relating to a relevant matter that could induce an error in the administration of the IRPA. However, in this case, there is no question that there was a misrepresentation, given Mr. Wang's concession that he was refused a US visa on four separate occasions and the fact that his May 2013 updated application did not declare these refusals. Furthermore, when the extract singled out by the Applicants is put in context and when the Decision is read as a whole, I have no hesitation to conclude that the IAD performed a thorough evaluation of the evidence submitted by the parties, ensured that the Minister had provided the required evidence, and reasonably concluded that the Minister had met his onus on the misrepresentation and its materiality. In other words, further to my review of the Decision and of the record before the IAD, I do not agree that the IAD erroneously interpreted and misapplied the burden of proof imposed by paragraph 40(1)(a) of the IRPA.

[32] *Yang* does not discuss the question of whether, as the Respondent submits, the burden of proof shifts to the appealing party on appeal to the IAD. However, it did find in the circumstance before it, where the appeal was brought by the applicants, that the onus was on the Minister. However, this Court has subsequently held that, with respect to the genuineness of a marriage and citing *Yang*, that "this was an issue on which the burden of proof lay with the Minister at both the ID and the IAD" (*Menjivar Melgar v. Canada (Citizenship and Immigration)*, 2022 FC 1490 at para 62).

[33] In this matter, the parties do not dispute that under s 40(1)(a) of the *IRPA* the burden of proof lies on the Minister to establish that a permanent resident or foreign national is inadmissible for misrepresentation. The ID's decision in that regard is the subject of this appeal. The jurisprudence is clear that an appeal before the IAD is not a true *de novo* hearing. Rather, the

IAD is entitled to consider the record before the ID and its decision as well as the new evidence and testimony of the parties. The IAD is not limited to considering whether the ID's decision was reasonable. It is required to determine if there was a misrepresentation. In my view, this means that the starting point for the burden of proof where s 67(1)(a) of the IRPA is engaged must be the same for the ID and the IAD – the IAD must "essentially [be in] the same position as was the Immigration Division" (*Castellon Viera* at para 26*)*. Thus, the Minister must prove the alleged misrepresentation on a balance of probabilities. In considering the appeal, the IAD must take into consideration the evidence that was before the ID as well as any new evidence submitted by the parties. Based on the totality of this evidence, as well as the ID's reasons, the IAD must determine if the Minister has met its burden and if the applicant is inadmissible. That is, based on both of these considerations, whether at the time the appeal is disposed of (i.e. when the IAD makes its decision), the ID's decision is legally valid.

[34] I conclude that, at the IAD hearing, the Minister was required to establish, on a balance of probabilities, that the ID's inadmissibly finding was valid, in light of the totality of the evidence before the IAD and the ID's decision. The IAD did not err in its determination that the Minister bore this burden.

ii. Reversed Onus

The Applicant's Position

[35] The Applicant submits the Minister called no witnesses to corroborate its case and that all of the documents relied on by the Respondent originate from SH, who was found to not be

credible. The Applicant claims that he provided objective evidence demonstrating that SH lied repeatedly under oath: to Indian authorities, to Canadian immigration authorities, to her family counsellor, to the Ontario Superior Court, and mislead the IAD when summoned to testify. Further, the only evidence submitted by SH, shopping receipts and a financial record, corroborate the Applicant's story. The IAD's decision to let deeds speak louder than words is unintelligible given that the IAD had substantial evidence before it of SH's misdeeds. The Applicant states that SH "was proven to be a chronic liar who holds little regard for the integrity of administration and judicial institutions. She declined to offer any corroboration of her allegations. The Applicant submits, that by contrast, he amply supported his narrative with several *viva voce* witnesses, affidavits/statutory declarations and objective documentary evidence".

[36] Further, the IAD's reasons for preferring SH's evidence – because her evidence had the ring of truth regarding important events in the marriage – does not meet the intelligibility standard identified in *Vavilov*. The decision does not evince a rational chain of analysis given that no credible or reliable evidence was put forward by the Minister to substantiate its case against the Applicant and the IAD does not coherently express how the Respondent met its burden of proof.

[37] The Applicant also submits that the IAD was unduly preoccupied with the undisputed fact that SH overdosed on sleeping pills on January 19, 2008 and was hospitalized for two days. The IAD took the Respondent at its word that the overdose was a suicide attempt motivated by SH's feeling of being mistreated by the Applicant. The Applicant asserts that there is no

corroborative evidence that SH attempted to take her life and that if this was true it is implausible that she would have been discharged from the hospital a day and a half later and resumed cohabitation with the Applicant.

The Respondent's Position

[38] The Respondent submits that the IAD provided a detailed, rational and reasoned explanation for all of its findings which contain no gaps and which reasons, read in conjunction with the record, explain why the IAD found the Applicant's evidence on key critical issues to be unworthy of belief. Accordingly, even though the IAD erred in imposing the burden of proof on the Minister, the IAD reasonably found that the evidence supported its conclusion on the genuineness of the marriage. While the Applicant claims he provided objective evidence to show that SH lied repeatedly and that the IAD should not have believed her, this ignores the vital point that the IAD made at the beginning of its reasons. Specifically, that it found SH not credible on some aspects of her evidence but, on the critical issue of her marriage to the Applicant and the dissolution of their marriage, her evidence was more credible than that of the Applicant and the various witnesses who testified in his support. The Respondent submits that the IAD's credibility findings are to be afforded deference.

[39] Further, none of the issues on which the Applicant claims SH was untruthful are germane to the issue that the IAD had to determine – that is, whether the evidence supported the conclusion that the Applicant committed misrepresentation in order to gain permanent resident status in Canada. As the IAD noted, its key task was to assess the evidence relating to the couple's actions and conduct up to September 2008 when the Applicant returned from India, by

which point SH had already decided to seek a divorce. The Respondent summarizes the IAD's evidentiary findings in that regard and submits that the IAD weighed the competing versions of events and reached reasonable conclusions. The Respondent submits that the Applicant's disagreement with the conclusions does not make them unreasonable. The problems with SH's evidence as put forward by the Applicant are all immaterial. As noted by the IAD, each of these alleged instances occurred after the Applicant had obtained permanent residence by misrepresentation and have no bearing on whether the Applicant entered into the marriage under false pretenses. It is also immaterial that none of SH's family testified, since the IAD had evidence before it which allowed it to conclude that the Applicant is inadmissible for misrepresentation. Accordingly, SH's failure to call witnesses does not bring into question the reasonableness of the IAD's decision.

Analysis

[40] It is significant to acknowledge at the outset that the IAD is entitled to make credibility findings and that those finding are owed deference.

[41] As stated by Justice LeBlanc in *Yu v. Canada (Citizenship and Immigration)*, 2016 FC 540:

> [13]…it is trite law that credibility findings made by the IAD are to be afforded a significant degree of deference. The IAD is in the best position to assess credibility since it has the opportunity to hear and see the Applicant give evidence in an oral hearing (*Barm*, at para 11). As such, the weight to be assigned to that evidence is also a matter for the IAD to determine (*Sanichara v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1015, at para 20, 276 FTR 190 [*Sanichara*]. As long as the conclusions and inferences drawn by the IAD are reasonably open to it on the

> record, there is no basis for interfering with its decision (*Sanichara*, at para 20).

[42] Similarly, in *Canada (Citizenship and Immigration) v. Munoz Pena*, 2020 FC 719, Justice Pentney held that this Court owes deference to the IAD's assessment of the evidence by virtue of its position as trier of fact (citing *Sivapatham v Canada (Citizenship and Immigration)*, 2016 FC 721 at para 12; *Pabla v Canada (Citizenship and Immigration)*, 2018 FC 1141 at paras 12–13) and that:

> [30] The applicant refers to the visa officer's decision and the inconsistencies he raised. However, the IAD's role is to determine credibility during the hearing. As long as the conclusions and inferences drawn by the IAD are reasonably open to it based on the evidence, its conclusion should not be interfered with (*Yu v Canada (Citizenship and Immigration*), 2016 FC 540 at paras 13–14). In addition, the IAD's role is not limited to the equivalent of judicial review: it has the jurisdiction "to make substantive determinations which may or may not lead it to substitute its own assessment" (*Canada (Citizenship and Immigration) v Abdul*, 2009 FC 967 at para 30).

[43] I also agree with the Respondent that the Applicant's submissions ignore a central finding of the IAD. As indicted above, the IAD found none of the witnesses to be credible, for the reasons it set out and described in detail in its decision. However, where there was a conflict in the evidence, the IAD preferred the evidence of SH as it had the "ring of truth", in particular regarding important events in the marriage, whereas the Applicant's evidence did not. With respect to events prior to September 2008, SH's evidence was more plausible and congruent with common sense than that of the Applicant and his witnesses.

[44] The IAD's reasons make it clear that it was acutely aware of the conflicting evidence and the resultant credibility concerns in the matter before it.

[45] For example, the IAD referred to Justice Southcott's decision in *Bains* where the prior IAD decision was found to be unreasonable because of the failure to consider a piece of corroborative evidence. Specifically, the evidence of the Applicant's uncle that SH drove the Applicant to the airport when the Applicant returned to India which, on its face, appeared to contradict the evidence of SH that she did not know the Applicant was returning to India. The IAD quoted from Justice' Southcott's decision, the relevant paragraphs of which are as follows:

> [18] My decision to allow this application for judicial review turns on the Applicant's argument that the IAD ignored relevant evidence. In reaching this conclusion, I am conscious of the difficult task with which the IAD was confronted, as it was obliged to choose between two irreconcilable versions of events. As such, I disagree with Mr. Bain's submission that the IAD erred by disregarding the principle that an applicant's sworn testimony is presumed to be true unless there is reason to doubt its truthfulness. While this principle is trite law (see *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 at para 5 (FCA)), it is of little assistance to Mr. Bains. While he testified before the IAD, his ex-wife also provided sworn written testimony which contradicts his evidence in significant respects. The IAD was therefore required, in considering Mr. Bains' appeal, to determine which of the two versions of events was more credible.
>
> [19] The IAD found the evidence of Mr. Bains' ex-wife to be more credible. Both parties characterize the IAD's credibility analysis, resulting in its preference for the ex-wife's evidence, as turning on conclusions as to plausibility, i.e. a finding that the ex-wife's version of events was more plausible than that of Mr. Bains. Mr. Bains acknowledges that the IAD is entitled to make plausibility findings but argues that the findings of the IAD in the present case are not based on clear evidence or accepted facts as the jurisprudence requires (see, e.g. *Ansar v Canada (Citizenship and Immigration)*, 2011 FC 1152 at para 17; *K.K. v Canada (Citizenship and Immigration)*, 2014 FC 78 at para 60)).

> [20] I concur with the parties' characterization of the IAD's credibility analysis as plausibility-based and with the acknowledgement that such an analysis is a tool available to the IAD. Indeed, in considering two conflicting versions of events, an analysis of the extent to which each version is consistent with common sense, taking into account the available evidence and uncontested facts, may in some circumstances be the only means available to an administrative decision-maker to choose between the two competing versions. However, regard should also be given to whether either version of events is inconsistent with other evidence, so as to provide a reason to doubt the credibility of one and prefer the other. My difficulty with the decision in the present case is the IAD's failure to consider evidence of this latter sort which, on its face, appears to directly contradict an aspect of the evidence of Mr. Bains' ex-wife.

[46] Justice Southcott also emphasized that he expressed no conclusion as to the significance of the evidence of the Applicant's uncle, and its apparent corroboration/contradiction of the competing versions of events, other than that this evidence raised a point which required consideration by the IAD in order for the decision to be considered intelligible and therefore reasonable. For this reason, the judicial review was allowed and the matter remitted back to the IAD.

[47] When re-determining the matter, the IAD stated that, in the appeal before it, it had done exactly as Justice Southcott asked: "I have considered both versions of events. Nobody in this appeal is credible in all aspects of their testimony. However, I prefer SH's version when it comes to significant events in the relationship and what transpired where there is a conflict in evidence. More specifically, SH's version of what happened prior to the total breakdown in the relationship in August/September 2029 was more credible and reliable" (IAD decision at para 89).

[48] With respect to the evidence at issue in *Bains*, the IAD set out the conflicting evidence and assessed it and any objective documentary evidence – as it did in each of its many credibility findings. It then considered that: the Applicant's testimony regarding the same event was inconsistent across his various hearings; the Applicant's interview evidence given at the visa post did not support his version of events; and, the testimony before the IAD of two of the Applicant's uncles, one of whom gave evidence that was incongruous with his own previous evidence and both of whom gave evidence which was inconsistent with SH's evidence, which the IAD preferred. The IAD also noted that SH used her permanent resident card as her ID for the statutory declaration she signed in August 2008 while she used her driver's licence with respect to her 2014 statement. The IAD found that this contemporaneous evidence supported its finding that SH did not have a driver's license in March 2008 and did not drive the Applicant to the airport.

[49] The IAD was also clearly aware of and took into account the competing motivations of SH and the Applicant. While counsel for the Applicant argued that SH brought her allegation that the marriage was not genuine for self-serving and vindictive reasons, and regardless of its concerns with some aspects of her credibility, the IAD still concluded the marriage broke down because the Applicant intended to use SH to come to Canada as a permanent resident. The IAD stated that SH's motivations, after September 2008, were clear and were considered in assessing her evidence. The IAD also stated that it found that the Applicant's motivation was to gain a foothold in Canada as a permanent resident though marriage to SH and that he never intended to honour his vow of marriage. Further, that the Applicant had provided testimony under oath on three separate occasions and "Other than a few instances outlined below, I do not believe

anything the Appellant says and I find him to be a wholly unreliable witness lacking in credibility. The testimony of the Appellant's witnesses was similarly unreliable, and they are clearly not impartial to the outcome of this appeal" (IAD decision at paragraph 91).

[50] Having considered the various points of contradictory evidence, the IAD concluded that SH's evidence regarding matters occurring *after* September 2008 was less reliable because after that point, SH was assiduously trying to have the Applicant removed from Canada and she was putting forward her best case, which contained omissions and untruths. However, throughout its reasons the IAD returned to its point that it was with respect to the events *prior* to September 2008 that it found SH to be more credible. It found that her evidence could be contrasted to the evidence of the Applicant and his witnesses, the majority of which the IAD stated it found to be unreliable and not credible. It also found that the documentary evidence prior to August/September 2008, when the marriage imploded, was more reliable (IAD decision at paragraph 307).

[51] The IAD considered the evidence, including the conduct of the Applicant, in assessing its credibility. Its findings include those summarized as follows:

- In 2019, the Applicant was able to find three emails from 2006 pertaining to the marriage match, but he produced no other contemporaneous emails or evidence of any correspondence with SH.

- The objective documentary evidence established that the Applicant was not enrolled in school in India in December 2006 as he and his family claimed, meaning that the December 2006 wedding date was agreed and not inconvenient and that the Applicant

and his family gave this untrue evidence to try to obfuscate the Applicant's intentions to immigrate to Canada.

- The Applicant's conduct in seeking a permanent resident visa before completing his studies suggested that he was motivated to get to Canada quickly. He made no reference in his visa post interview of a plan to return to India to finish his studies, and SH's statements at the visa post showed that she was not aware of the Applicant's plan. The contemporaneous visa post interview notes demonstrated that the Applicant obfuscated his intention to return to India to obtain his degree after landing. Further, his sister's testimony was that he was supposed to return a few days after landing.

- While the Applicant and his family insisted that that SH knew that the Applicant would be returning to India and was fine with this, this conflicted with SH's evidence. The IAD preferred the contemporaneous documentary evidence which showed that SH first learned two months after the Applicant landed that he was returning to India to study and that she was previously unware of his intention.

- SH's conduct, also contemporaneous to the subject time frame, showed that she was legitimately invested in the marriage. Up until the time SH decided she could not continue with the relationship, in late August 2008, the relationship was a real one for her. Irrespective of her subsequent actions, this factor lent more credibility to her version of the story.

- SH's version of the relationship breakdown was more credible than that of the Applicant. Her testimony was that the Applicant's two uncles and SH picked the Applicant up at the airport on January 13, 2008. After three days, the Applicant told her he did not want to

live with her and that his family had forced him to marry her. On January 19, 2008, when she returned from work, other people in the house told her that the Applicant had gone to his cousin's. She waited until nighttime and then called him to ask him when he was coming back. He said he did not know. She then went to her uncle's house to spend time with him, her nephew and her mother. She was worried about what people would think as being divorced is not looked on kindly in her culture and she could not sleep. She went to the drug store and bought pills suggested by the pharmacist. Her evidence was that her objective first was to fall asleep, then she took them all to end her life. The IAD found this to be a plausible and credible version of what transpired and led to the suicide event. It noted that she was a young woman (then 21-years-old), had arrived in Canada only in 2005 after her father's sudden death in 2004, and was somewhat vulnerable as a result. The IAD found that this testimony had the ring of truth. There was no dispute that she took an overdose of sleeping pills a few days after the Applicant landed. She said she did so because the Applicant told her that he wanted to separate from her. The IAD found that the Applicant's evidence about SH's actions on January 19, 2008, and the reasons for them, shifted with time. His versions of events included: that SH attempted suicide because the Applicant stayed out late and she was stressed by exams; that she was trying to scare and threaten him but he did not know why; that she was upset because he did not listen to her; that he stopped her from going to her uncle's house and this "settled her mind", but conversely that she was mad because he did not let her go to her uncle's house; and, that he visited her at the hospital but she threatened to have him arrested. The IAD found that the evidence of the Applicant's father's about the reasons for the overdose was also inconsistent. The IAD also noted that the Applicant testified that SH

returned to work and school a few days after she was discharged from hospital. It found that if she were stressed by school or work it would be logical to stop one of both of these to manage her stress. The fact that she went back to school and work so soon after the overdose clearly pointed to the fact that the overdose was for another reason and concluded that this was because the Applicant told her that he did not want to be with her. This supported that the Applicant married her to obtain permanent resident status. And, despite the Applicant's dubious conduct towards her, SH still agreed to reconcile with him after the suicide attempt which was another sign that, for her, the marriage was real.

- As to the Applicant's return to India, the IAD found that SH's testimony that she did not know that the Applicant was going to return to India to complete his studies was undermined by her statement to the Indian police in January 2009. In that statement, SH indicated that the Applicant received his permanent residence card after he had been in Canada for about a month and a half and, after about two months, said he had to return to India to give school papers. However, he did not come back until after seven months had passed. The IAD concluded that SH knew (two months after he landed) that the Applicant had to return to India but that he left on March 11, 2008 without telling her. This was bolstered by other findings the IAD set out. The IAD found the statement in the police report that SH learned after the Applicant landed that he had to return to India to study, and he told her then he would return to her but did not do so, to be credible.

- The Applicant's university degree established that he had finished his studies in May 2008 but he did not then return to Canada. The IAD assessed the Applicant's evidence that he stayed in India because his mother was diagnosed with and treated for breast cancer but found that his evidence as to the timing of these events varied and was

inconsistent with the medical records. While the evidence of the Applicant and his father was that SH was annoyed and did not care about the diagnosis and was pushing the Applicant to return to Canada, her evidence was that she was not aware of it. The IAD found that it was not credible that if SH thought she was in a genuine relationship she would respond in this way and if, as the Applicant asserted, SH was fine with him returning to India, that she would suddenly be so unreasonable in the face of this delay in his return to Canada. Further, there was limited documentary evidence to show that the Applicant was communicating with SH by any method while he was in India. At the ID he testified that he could not obtain his phone records from India but also said that he was using MSN and Yahoo to contact SH and he had a Facebook account. The IAD pointed out that by the time of the hearing before it the Applicant still had not produced any evidence from this time – this despite providing the three emails between the Applicant and SH in 2006 and 2007. This supported a finding that the Applicant was not trying to reach out to SH while he was in India and explained why she reasonably concluded that the marriage was over by August or September 2008.

- Despite his mother's serious illness, his evidence that she was on her deathbed and his sister's evidence that the Applicant was driving his mother everywhere, taking her to all of her medical appointments and attending to her personal care, the Applicant returned to Canada in September 2008. His evidence was that SH and her family pressured him to return. And, after he arrived at the airport in Canada, he learned of the police report made in India. Despite this, he remained in Canada until 2022. He applied for citizenship in 2012 based on his physical presence in Canada. The IAD found the Applicant's explanation about his return to Canada to be entirely implausible. The IAD elaborated on

its reasoning in this regard and concluded that a more likely scenario was that the Applicant was aware of the police report, filed in India by SH's uncle on September 4, 2008, and that this was the reason he fled back to Canada. The police report refers to the fact that SH and her family were trying to prevent the Applicant from returning to Canada because he had broken his marriage promise. When he got back to Canada he evaded SH, maintained a low profile and ensured he retained his permanent residence status here. The IAD found that his conduct and evasive behaviour after this point supported this finding and showed that the Applicant was aware of the possibility of SH taking action to revoke his immigration status in Canada.

- The IAD reviewed the Applicant's evidence as to where he was living after his return to Canada. It accepted that he had lived at the several locations claimed but, if he did, then his testimony and the evidence showed that he had lied on his citizenship form filed on October 2012. This bolstered the IAD's finding that the Applicant was aware that there could be immigration consequences for his actions and was in hiding. I note that while counsel for the Applicant continued to assert in this judicial review that SH is a chronic liar demonstrated, in part, because she misrepresented to the Superior Court with respect to her divorce application, the IAD explicitly rejected that assertion, finding that any issue counsel for the Applicant had lay with a process server or SH's former counsel, not with SH.

- The IAD found there was negligible credible evidence to show the Applicant spoke with SH at all between March 2008 and October 2008. A phone record showed nine calls between October and December 2008 to SH, all one minute in length, and there was no indication SH answered any of those calls. The IAD then considered the Applicant's and

SH's evidence about the calls. SH's evidence was that the Applicant did not call before the four sessions of marital counselling that she attended concluded (despite three letters being sent to he Applicant and four calls being placed seeking his attendance, he did not attend). She then decided that the marriage was over. The IAD found that her testimony was bolstered by the calls beginning only after the counselling was concluded and aligned with the Applicant's testimony that he called SH and she said it was too late. The IAD rejected the Applicant's depiction of these calls as a good faith effort to each out to SH.

- The IAD also considered what it described as a lot of confusing and contradictory testimony about the Applicant's efforts to reconcile, but noted a lack of credible corroborating objective evidence. The IAD addressed the evidence and concluded that there was limited evidence to show any good faith efforts on the part of the Applicant to keep the relationship going after he returned to Canada in September 2008. Further, that his and his witness's statements about the efforts to reconcile the couple were difficult to understand in light of the actions of SH and her family. They were so aggrieved they filed a police report in India and SH pursued immigration enforcement against the Applicant in Canada. One point of consistency with the witnesses was that SH and her family had no interest in pursuing reconciliation with the Applicant after he returned to Canada. The IAD found that it was not credible that the Applicant hoped, as he claimed, that things would work out given this context. His statement that he did not realize the relationship was over until 2011 was not believable. He made no efforts other than the one-minute phone calls to reach out to SH and show her that he wanted to be a good husband to her. His deeds spoke louder than his words.

- As to the letter from the marriage counsellor prepared around October 2008 and their subsequent affidavit filed after being contacted by the Applicant in 2016, it is sufficient to say that the IAD stated that it was more cynical about SH's reasons in obtaining this counselling and agreed that she did so to bolster her complaint against the Applicant, although this did not mean what she told the councillor was entirely untrue. What was clear was that the marriage was over for SH and her family by September 2008 when the police report was filed.

- The IAD found it troubling that at the hearing SH could not recall making a police report or her family members doing so on her behalf, noting that she had referred to the police report in her petition for divorce. This lack of recollection undermined her credibility. The September 2008 police report was made on the basis of an issue with respect to dowry and the Applicant's conduct to obtain status in Canada. The IAD noted that it had already concluded that the Applicant used SH to obtain status in Canada, so it accepted that allegation as truthful. Further, SH's evidence regarding matters occurring after September 2008 was less reliable because by that point SH was assiduously trying to have the Applicant removed from Canada and she was putting forward her best case.

- Finally, the IAD addressed the considerable number of letters and affidavits submitted by the Applicant but, for the reasons set out, assigned them limited weight.

[52] The IAD concluded that:

> [316] The Appellant and his witnesses and affiants can say whatever they would like about what happened between the Appellant and SH, but the Appellant's conduct and negligible amount of credible objective evidence to support his assertions

> shows clearly that he used her and his marriage to her was primarily for an immigration purpose. This is a direct misrepresentation.

[53] And, on a balance of probabilities, that the Applicant misrepresented that his marriage was genuine when he became a permanent resident. Further, that the marriage was entered into primarily for an immigration purpose. The IAD concurred with the ID in finding that the Applicant engaged in a direct misrepresentation which induced an error in the administration of the *IRPA*. It also rejected the procedural fairness argument made by the Applicant and found, therefore, that the ID's decision was legally valid. The Minister's counsel had met their burden.

[54] The Applicant takes the view that because the Minister relied only on the disclosure in the ID proceedings, the transcript of that hearing, the ID decision, and called no witnesses to corroborate its case, the Minister was relying only on documents originating from SH, who was found not to be credible. Accordingly, the Minister could not meet its burden and the IAD erred in reversing the onus. When appearing before me the Applicant asserted that the IAD was not entitled to rely on or consider any of the Applicant's evidence in reaching it conclusions as to whether the burden of proof had been met.

[55] In my view, there is no merit to this argument. The IAD considered *all* of the evidence. In detail and at length. Given that the Applicant and his family members were found not to be credible, their evidence carried little weight. The IAD recognized that SH also had credibility problems but, for the period before September 2008, found her evidence to be more credible than the Applicant's. The IAD also relied on contemporaneous documentary evidence where possible. Because SH's evidence was found to be more credible and reliable, it was afforded more weight

than the Applicant's evidence and, accordingly, the Minister met the burden of proof. The IAD is entitled to review and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances (*IRPA* s 175(1)(c)). Thus, although the Applicant asserts that the IAD reversed the burden of proof this argument is entirely based on the Applicant's premise that the Minister did not produce any reliable evidence to support its position. However, this ignores the IAD's actual credibility findings, which do not support that the onus was reversed by the IAD.

[56] To the extent that the Applicant is suggesting that he generated more evidence than the Minister, and that the IAD was not permitted to consider the Applicant's evidence when determining if the Minster met its onus, I do not agree. The Applicant points to no authority in support of this submission. In this matter, the IAD found that the evidence that the Minister produced was simply more credible than that of the Applicant. It was therefore afforded more weight when determining if the Minster met its onus in establishing that the Applicant misrepresented. It is not a matter of how much testimony and how many affidavits and documents the Minister or the Applicant produced, although it is apparent that the Applicant at all times took the "more must be better" approach to his litigation, the evidence must be credible.

[57] I also do not agree that the IAD was unduly preoccupied with SH's overdose of sleeping pills. This was one of the many aspects of the evidence that the IAD considered. That said, in my view, it was a very significant event. Further, the IAD reasonably found that it was the result of the Applicant informing SH a few days after he arrived in Canada that he did not want to live with her and had been forced by his parents to marry. SH's evidence was that she took the

sleeping pills first to sleep and then took them all to end her life. The IAD reasonably inferred that this was a suicide attempt. The IAD found SH's evidence on this point to be more credible than the Applicant and his witnesses. The Applicant now asserts that there was no corroborating evidence that SH attempted to take her life. However, it is not apparent that there had to be corroborating evidence given that the IAD accepted her evidence on this point. I also reject the Applicant's assertion that, if SH had really attempted suicide, it was implausible that the hospital would have discharged her only a day and a half later. The Applicant points to no evidence in support of this. And, in my view, unless SH continued to be at risk to herself, or was deemed a risk to others, it is entirely plausible that she would be discharged after a few days. As to the Applicant's other submissions, these amount only to a disagreement with the IAD's assessment of the credibility of the evidence. The fact that the Applicant disagrees does not make the decision unreasonable. The IAD's credibility findings are to be afforded deference (*Yu* at para 13).

iii. The IAD's treatment of the Applicant's evidence

The Applicant's Position

[58] The Applicant asserts that the IAD's findings that there was an absence of objective evidence of the Applicant making credible and good faith efforts to salvage the marriage, or that he was ever committed to the marriage, demonstrates that the IAD ignored or dismissed critical evidence without providing cogent reasons and also reaffirms the Applicant's assertion that the IAD improperly shifted the burden of proof to the Applicant to prove his innocence. Further, that the bulk of the IAD decision is a microscopic and unreasonable analysis, often of peripheral

issues, of the Applicant's testimony and evidence in order to justify its adverse credibility or implausibility findings. The IAD erred in its treatment of the Applicant's evidence overall by failing to appreciate how, when assessed globally, the Applicant's version of events is consistent on all important issues and is well corroborated. A more global analysis should have been undertaken, where each piece of evidence was looked at in reference to the whole. The IAD also failed to consider how the Applicant's mental health diagnoses impacted his testimony.

The Respondent's Position

[59] The Respondent submits that the IAD considered and weighed all of the evidence the parties adduced and rejected some for either being inconsistent with other objective or more credible evidence, or for simply being implausible. This is at the heart of the IAD's role as the trier of fact: consideration of competing versions of what occurred and the provision of reasonable explanation for its preferences. This is exactly what the IAD did.

Analysis

[60] In my view, there is no merit to the Applicant's submission.

[61] The Applicant submits, in support of its view that the IAD erred in finding that the Applicant made no reconciliation efforts, and that this finding is contradicted by his phone records, the testimony of his uncle and an affidavit. According to the Applicant, taken together, this evidence strongly supports the alternative conclusion that the Applicant and his family made

strong efforts to reconcile and that the IAD provided no cogent reasons why this evidence should be dismissed.

[62] However, the IAD clearly addressed this and other evidence in paragraphs 209 and 245-264 of its reasons. As discussed above, the IAD found that the only evidence the Applicant produced that he attempted to contact SH was a phone record indicating nine one-minute calls and found the evidence of the Applicant's father, the evidence of his uncle and an affidavit not to be credible on the issue of reconciliation.

[63] Nor do I agree that the IAD's reasons were microscopic and fixated on peripheral issues intended to justify its findings or that the IAD "siloed" its analysis and failed to consider the evidence globally. While it may be possible to isolate a few peripheral points in the IAD's lengthy reasons (and the Applicant does not do so), overall its credibility and plausibly analysis was concentrated on the evidence pertaining to critical issues concerning SH's marriage to the Applicant and the dissolution of that marriage, in order to assess if the Applicant misrepresented. The IAD stated that it conducted a holistic review of the evidence and, having reviewed the IAD's reasons, I am satisfied that it considered the evidence globally. The use of subject categories as an organizational tool in a lengthy decision does not silo issues such that evidence is viewed in isolation. Further, the IAD's reasons demonstrate that much evidence overlapped when considering the various subject categories.

[64] The Applicant also asserts that the IAD failed to take into account the Applicant's mental health diagnosis of PTSD and depression along with his chronic insomnia and high stress levels

and how this impacted his testimony. However, the IAD addressed both psychiatric reports which were filed by the Applicant after the hearing had begun (which was conducted over an extended period of time) in paragraphs 48-75 of its decision and, for the reasons set out, assigned both limited weight. The first report, dated September 30, 2019, was two sentences long, stating only that the Applicant and his sister attended at the doctor's office on the date of writing and the Applicant's sister "confirmed his mental stated is abnormal" from which the doctor stated, "Diagnostically, he has an adjustment disorder". The IAD reasonably found that it had no way of understanding what the adjustment order might be and how it impacted on the Applicant's ability to testify.

[65] The IAD found the second report, by a different psychiatrist and dated November15, 2019, to be more helpful but still assigned it little weight. Among other things, the IAD noted that the Applicant and his sister provided the narrative to the psychiatrist who appeared to rely solely on this as they did not conduct any standard psychological testing to support the diagnosis of PTSD with Dissociation and a current Major Depressive Episode (Moderate to Severe). The IAD also pointed out that although the Applicant now claimed that he had been suffering from mental health issues since 2008, these were the first psychiatrists he saw (in 2019) and that he had provided no medical evidence from his primary care provider. Further, the transcripts of both previous hearings indicated that neither the Applicant nor his counsel mentioned that the Applicant's ability to testify was impacted in any way by his mental health and there was no discussion as to whether the Applicant should be designated as a vulnerable person. The Applicant was also selective in what he told the psychiatrist, significantly, making virtually no mention of his immigration issues or why the report was required. His sister's statement to the

psychiatrist that the Applicant could no longer enjoy going out with friends or playing games and preferred to spend time alone in his room stood in contrast to the many letters of support filed on behalf of the Applicant by his friends. The IAD found that the psychological report did not resolve the issues with the Applicant's credibility, which the IAD found to be wholly unreliable, and that the Applicant and his sister were not truthful with the psychiatrist. Nor did the psychiatrist speak to whether the Applicant's conditions would have impacted his ability to testify before the IAD.

[66] The Applicant does not address any of these findings nor the fact that the IAD considered the psychiatrists' reports but afforded them little weight.

Breaches of Procedural Fairness - s 67(1)(b) of the IRPA

The Applicant's Position

[67] The Applicant submits that the IAD is obligated by s 67(1)(b) to conduct an independent assessment of whether there was a failure to uphold the principles of natural justice in the proceedings leading to the removal order. The two failures previously put forward by the Applicant were the failure to disclose SH's complaints during CBSA's 2014 marriage of convenience investigation and to disclose her November 2008 complaint. Although the IAD relied on *Shan* for the principle that a party is required to raise an issue of procedural fairness at the first opportunity, (then) counsel for the Applicant did communicate with the CBSA about the lack of information in the procedural fairness letter. The basis for the marriage of convenience investigation was not disclosed and the Applicant submits that it would have been reckless for

him to respond to the letter with incomplete information. The Minister disclosed the investigation documents at the ID, which relied on them in rendering its decision. The ID's decision was thereby tainted by the documentation derived from an unfair investigation process.

[68] The Applicant also submits that the IAD ignored his submissions concerning a November 2008 complaint, preferring the Respondent's submission that the document did not exist.

[69] Further, that the IAD was wrong in finding that procedural fairness concerns should have been brought earlier. This would be true if they related to the IAD redetermination. Here, however, the concerns were identified in the context of a *de novo* IAD appeal. This is the context where procedural fairness issues should be raised. The Applicant submits that the Respondent is incorrect in its submission that the *de novo* nature of the hearing before the IAD relieves it of the burden of addressing prior breaches of procedural fairness.

The Respondent's Position

[70] The Respondent submits that the IAD did not breach the principles of natural justice. The Applicant's fairness argument is premised on the alleged failure of CBSA to disclose to him SH's statutory declarations while he was being investigated in 2014 for misrepresentation. However, those declarations were eventually disclosed to him as part of the admissibility proceeding. He claims a third declaration has not been disclosed to him but the IAD found, given the Minister's denial of its existence, that it is unclear that it exists. Since the procedure was *de novo*, the IAD was not bound by or beholden to anything that occurred previously. The Applicant had the declarations that he claims were not disclosed to him and was able to cross-

examine SH on their contents and all matters pertaining to her marriage to the Applicant. In any event, the Applicant's delay in raising this issue constitutes an implied waiver. He was required to raise the issue at the earliest available opportunity and he did not do so at any of the IAD's ten sittings, leaving the issue to be raised only in his final written submissions.

Analysis

[71] I first note that the IAD dealt with this issue as a preliminary matter. It indicated that at issue was the CBSA's failure to provide SH's statutory declarations to the Applicant while he was being investigated in 2014 for misrepresentation. The IAD acknowledged that the procedural fairness letter and the s 44(1) report sent to the Applicant did not provide sufficient information to allow him to respond and that the CBSA had the two statutory declarations sworn by SH but that they were not provided to the Applicant at that time. Procedural fairness had required the disclosure by CBSA.

[72] However, the IAD noted that the record indicated that the Applicant's then counsel (Mr. Hahn, his first counsel) had communicated with CBSA but did not make any submissions (in response to the allegations contained in the report) before the filing deadline. The record did not shed much light on the exchange.

[73] Regardless, because the issues of procedural fairness should have been raised earlier, the IAD declined to overturn the ID's decision. It noted that the allegations were raised by the Applicant only in final written submissions after ten appeal sittings before the IAD. The IAD stated that they should have been raised even before it began. Further, the section 44 report and

referral were issued about 8 years ago and the procedural history showed that Applicant's counsel at the ID hearing was aware of the underlying facts that support the argument that was now being made before it, as was his subsequent counsel. The issue could have been raised in a Federal Court challenge to the s 44 report, the s 44 referral and perhaps even the ID decision, had the matter been properly raised. The IAD found it was too late to raise the issue.

[74] Additionally, the Applicant had a fair hearing before the ID and in his two hearings before the IAD. While his current counsel argued that due to a failure of prior counsel the ID had before it very limited evidence, the IAD did not agree and pointed out that prior to the ID hearing the Applicant's then counsel (his second counsel) received the full package of evidence contained in the record – including both of SH's statements and the investigation information from the Minister – and filed evidence in response. Counsel before the ID had also raised the issue of the procedural fairness letter and the communications with the Applicant's first counsel, but made no reference to a breach of procedural fairness. Nor was a procedural fairness issue raised by the Applicant's (third) counsel when the Applicant appealed the ID's decision to the IAD (the first appeal). The judicial review of the IAD's first decision also did not indicate that procedural fairness was raised as an argument at that time (by the Applicant's fourth counsel).

[75] The IAD noted that it heard 10 days of testimony, including SH's testimony. It found that the Applicant had a full, fair and extensive opportunity to present his case and, at this juncture, a procedural fairness argument with respect to an earlier stage of the administrative process must be rejected.

[76] As discussed above, the hearing before the IAD was a *de novo* proceeding. “This means that the Board can review new evidence and render its own decision; it is not bound by the original decision-maker” (*Fang v. Canada (Citizenship and Immigration)*, 2014 FC 733 at para 26).

[77] SH’s two statutory declarations were disclosed to the Applicant prior to the hearing before the ID and were part of the records that were before the ID and both IAD appeals. Further, SH was required by the IAD, in the second hearing, to give testimony and was very closely cross-examined by the Applicant’s current counsel. As the IAD noted, in the appeal, it was SH’s allegations that formed the entire basis of the misrepresentation case against the Applicant. Given this, and that her declarations were before the IAD as was her direct testimony, it is difficult to see how the non-disclosure of the two statutory declarations by the CBSA when investigating the allegation of misrepresentation was not entirely cured by the *de novo* hearing before the IAD, which hearing also permitted the Applicant to testify, along with many of his his relatives, and to file supporting affidavits and other materials (see *Canada (Attorney General) v McBain*, 2017 FCA 204 at paras 9-10; *Ye v. Canada (Minister of Citizenship and Immigration)* 2021 FC 1025 at para 17).

[78] In *Khan v Canada (Minister of Citizenship and Immigration)*, 2019 FC 105 at para 15-16, relied upon by the Applicant, this Court noted that the IAD, after concluding that a visa officer had breached procedural fairness by failing to provide the applicant with sufficient information of the specific concerns regarding the authenticity of a document in the procedural fairness letter, specifically noted that its jurisdiction to conduct appeals *de novo* enabled the breach to be cured

on appeal without the need to return the matter to the visa officer for reconsideration. Further, in order to address the concerns raised by the document, the applicant was allowed to submit new evidence that was not before the visa officer and was also afforded the opportunity to testify and raise other issues arising out of the visa officer's determination. The Court did not take issue with the IAD's position on its jurisdiction and ultimately dismissed the application for judicial review.

[79] Similarly, in this matter, the *de novo* nature of the appeal before the IAD served to cure the alleged prior breach of procedural fairness by the CBSA.

[80] And while the Applicant submits that the Minister disclosed the marriage of convenience investigation documents at the ID, which relied on them in rendering its decision causing its decision to be "tainted" by the "documentation derived from an unfair investigation process", the Applicant does not explain what documentation he is referring to or how the investigation documents were prejudicial and caused the alleged tainting. When appearing before me counsel for the Applicant submitted that the investigating officer's conclusion was effected – but did not explain how. Counsel also submitted that the issue goes to the weight afforded to the investigation report. However, it is entirely unclear to me that the IAD afforded any weight to the report. In any event, as I have indicated above, even if there was a breach of procedural fairness at the investigation stage, it was subsequent entirely cured as SH's evidence was thoroughly canvassed by the Applicant and assessed by the IAD.

[81] As to the IAD's finding that it was too late for the Applicant to raise this procedural fairness argument after ten days of testimony had concluded and only then as part of closing submissions, I see no error in this determination. The issue was not raised before the ID, in the prior IAD appeal hearing or in the judicial review of the first IAD decision. Further, the Applicant's counsel offers no explanation as to why this was only raised after the IAD hearing was concluded.

[82] As the Respondent submits, it was incumbent on the Applicant to bring forward any allegation of procedural fairness at the first opportunity and a failure to do so amounts to an implied waiver of any perceived breach of procedural fairness (*Alexander v. Canada (Citizenship and Immigration)*, 2023 FC 438 at paras 21-22; *Zhong v Canada (Minister of Citizenship and Immigration)*, 2011 FC 279 at para 22; *Hanif v Canada (Citizenship and Immigration)*, 2012 FC 919 at para 15; *In re Human Rights Tribunal and Atomic Energy Can* (1985), 1985 CanLII 3135 (FCA)). The Applicant failed to do and the RAD reasonable declined to permit the Applicant to raise the issue after the hearing had concluded.

[83] And, again, any breach of procedural fairness at the investigation stage was cured at the *de novo* hearing.

[84] Finally, while the Applicant insists that there was a third declaration that was not disclosed, the only reference to this document is found in the Global Case Management System. The Applicant pointed the court to a remarks entry which states "24NOV08 RECEIVED A STAT DEC FROM SPONSOR ON 17NOV08 AGAIN ADVISING US OF THE SAME INFO

AS NOTED ABOVE. HOWEVER, SHE NOW INDICATES THAT SPOUSE HAS RETURNED TO CANADA…". It is not apparent from the record that the existence of this statutory declaration was actually raised as a concern by Applicant's first counsel when appearing before the ID – the ID's decision does not mention it or any concerns as to procedural fairness. Before the IAD, the question of its existence does not seem to have been raised again until current counsel's last-minute procedural fairness argument. And, contrary to the Applicant's submission, the IAD did not ignore the Applicant's submission as to the existence of the document. Rather, it was not persuaded that it exists, noting that its existence was denied by the Respondent and there was no reason to doubt that denial. I would add that even if it did exist, based on the GCMS entry upon which the Applicant relies, it does not appear to have added anything new to SH's prior declaration, nor does the Applicant point to any evidence suggesting reliance on the disputed declaration.

[85] Given that the Minister apparently has indicated that it does not exist and the Applicant points to nothing in the investigatory documents or elsewhere to support that it does exist (beyond a single reference in the GCMS notes) and that it was relied upon to the Applicant's detriment, the IAD was entitled to accept the Respondent's view that the document does not exist. Nothing turns on this point.

[86] In my view, the IAD did not improperly decline to exercise its jurisdiction pursuant to s 67(1)(b) of the IRPA.

Section 67(1)(c) of the IRPA - H&C considerations

The Applicant's Position

[87] The Applicant submits that while the IAD applied the *Ribic* factors, adapted for misrepresentation, given the Applicant's consistent denial that he entered into a marriage of convenience and the preponderance of evidence that supports his position, the IAD's assessment of the factors is fundamentally skewed. The IAD relied on SH's version of events, despite finding that she lacked credibility. The IAD's finding that the Applicant demonstrated a lack of remorse because he refused to accept responsibility for the misrepresentation, "in the face of overwhelming evidence to the contrary" was internally in consistent with its finding that SH was not credible.

[88] Further, the IAD's assessment of the personal hardship the Applicant would suffer if returned to India demonstrates its siloed and unreasonable treatment of the evidence and also failed to properly assess the hardship which the Applicant would face upon removal from Canada. India's specific country conditions were not considered, especially in light of the Applicant's serious mental health conditions and that he faces the loss of everything he has established in Canada.

The Respondent's Position

[89] The Respondent submits that the Applicant's criticism of the IAD's application of the *Ribic* factors is based on his insistence that the evidence supports his narrative that he did not

enter into a marriage of convenience. However, the IAD reasonably did not accept his version of events for the reasons it set out. The Applicant's insistence that he did not misrepresent does not mean that the IAD erred in its overall application of the modified *Ribic* factors. Further, the IAD considered the Applicant's submissions with respect to the country conditions and how they might affect the Applicant but found that it had "insufficient information to make a finding regarding any hardship to the Appellant because of his PTSD or depression, or any other profile or particular issue he might have if her returns to India". The Respondent submits that the Applicant has not demonstrated otherwise.

Analysis

[90] The IAD identified the *Ribic* factors, adapted for misrepresentation, as set out in *Wang v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 705 at para. 8:

- the seriousness of the misrepresentation leading to the removal order and the circumstances surrounding it;
- the remorsefulness of the appellant;
- the length of time spent in Canada and the degree to which the appellant is established in Canada;
- the appellant's family in Canada and the impact on the family that removal would cause, including the best interests of the child; and
- the degree of hardship that would be caused to the appellant by removal from Canada, including the conditions in the likely country or removal.

[91] Further, that the onus is on the Applicant to explain why he should stay in Canada. The IAD then addressed each of these factors. It is not necessary for me to set out that analysis in whole here in order to address the Applicant' submissions.

[92] The Applicant's argument that the IAD's assessment of the *Ribic* factors was fundamentally skewed cannot succeed. This is premised on the Applicant's view that he produced more as well as more credible evidence to support his assertion that he did not enter into a marriage of convenience. However, the IAD did not accept his evidence as credible and reliable. Further, while the IAD acknowledged that there were also concerns with SH's credibility, for the critical period before September 2008, the IAD preferred her evidence for the reasons it set out. The IAD's findings of fact as to credibility were therefore not internally inconsistent and its assessment of the *Ribic* factors was not skewed.

[93] As to the IAD's consideration of remorse, it found that the Applicant has never admitted to his misrepresentation and persisted in advancing an inherently incredible version of events. The IAD found that his refusal to accept responsibility in the face of overwhelming evidence to the contrary demonstrated a lack of remorse and that this factor did not weigh in favour of granting special relief. Essentially, the Applicant disagrees with the IAD's assessment of the credibility of the evidence. However, the fact of the disagreement does not render the IAD's assessment of the *Ribic* factors unreasonable.

[94] In addressing the degree of hardship that would be caused to the Applicant by removal from Canada, the IAD found that this was not established on the evidence. The IAD set out his

submissions, including his response when asked what would happen to his mental heath if he were deported which was that “I am already not stable. I cannot do what I need to do. If that were to come upon me I would become crazy I think”. The IAD stated that it found the Applicant’s statements about his hardship in India to be hyperbolic. Similarly, his sister’s testimony included that the Applicant could not survive in India because of drug abuse going on and people killing each other. The IAD pointed out that there was no suggestion that the Applicant had ever used or abused drugs, in fact he had indicated to the second psychiatrist that he has never had a substance abuse disorder. Thus, it was unclear why drug abuse in India would be a concern.

[95] The IAD also addressed his counsel’s various arguments, including that the Applicant would be disproportionally affected by removal due to his mental health conditions which she submitted would be aggravated. The IAD noted that the Applicant provided various articles, including one suggesting that India does not spend enough of its GDP on mental health. The IAD found that this was an opinion article and shed little light on the Applicant’s personal circumstances. There was also limited evidence to show that the Applicant required ongoing mental health support and that the psychiatrists’ reports did not say anything about the impact on the Applicant’s mental health if he were removed to India. In short, the IAD found that the Applicant had not demonstrated how he would be affected by any of the issues identified in the articles submitted by his counsel including corruption, pollution and human rights issues. The IAD concluded that it had insufficient information to make a finding regarding any hardship to the Applicant because of his PTSD or depression, or any other profile or particular issue he might have if he returns to India.

[96] Having reviewed the IAD's reasons it is apparent that the IAD did consider, among other things, whether removal would have an impact on the Applicant's mental health, but found that the Applicant had failed to provide sufficient evidence to meet his onus in that regard.

[97] The IAD concluded that the only factors weighing in favour granting special relief were the Applicant's establishment in Canada and his family ties here. All of the other factors were negative or neutral. In the matter before it, the threshold for special relief was high because of the seriousness of the misrepresentation, which was maintained over many years. The IAD found that the weight of the positive factors did not outweigh the negative factors and they were insufficient to warrant special relief.

[98] In my view, this finding was not unreasonable.

Conclusion

[99] The primary premise of virtually all of the Applicant's submissions is based on his disagreement with the IAD's assessment of the credibility of the evidence. However, the fact that the Applicant produced more witnesses and more documentary evidence than the Minister does not mean that he must be more credible than SH. It is not a question of volume; it is a question of the reliability of the evidence. The IAD explained why it preferred the evidence of SH for the critical period prior to September 2008. Its assessment of all of the evidence was comprehensive and holistic. Its finding that the Applicant was not credible and its refusal to set aside the ID's decision that the Applicant is inadmissible for misrepresentation was reasonable as was its assessment of the H&C factors in determining that special relief was not warranted.

Proposed Certified Questions

[100] The Applicant has proposed the following two questions for certification:

i. Which party bears the burden of proof in a *de novo* appeal to the Immigration Appeal Division ("IAD") of the legal validity of a removal order, per s. 67(1)(a) of the IRPA?

ii. In immigration proceedings, can evidence emanating from an adverse interest witness, standing alone without corroboration, meet the standard of proof to establish a misrepresentation allegation, made pursuant to s. 40 of the IRPA?

[101] A certified question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must have also been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons (*Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 [*Zhang*] at para 9).

[102] With respect to the first proposed question, the Applicant submits that if the burden rests with the Minister, then a plain review of the IAD's reasons in this case shows an effective, unreasonable shifting of the burden of proof onto the Applicant to prove that he did not misrepresent. If the burden rests with the Applicant, then he was denied proper notification. Further, the question is clearly transcendent, as the outcome of the appeal will give certainty on the burden of proof issue to both parties to a removal order appeal and to the tribunal itself in all future matters.

[103] Conversely, the Respondent submits that the IAD proceeded on the basis that the Minister bears the burden, which was the Applicant's position. Whether the IAD erred, as the Minister contended in its written submissions in this application for judicial review, is at best academic in this case: the outcome of the IAD's assessment did not turn on it, neither does the Court's assessment of the reasonableness of the IAD's decision. As such, the first question would not be dispositive.

[104] I find that the question is not dispositive of the appeal. The IAD placed the burden on the Minister, which is what the Applicant advocated before the IAD and still advocates before me. Given the IAD's assessment of the credibility of the evidence, the outcome would not have changed even if the onus had been placed on the Applicant. In other words, it was the credibility of the evidence that ultimately was determinative of the IAD's decision and, therefore, the reasonableness of that decision on judicial review. This did not turn on the question of who bore the burden of proof. Although the IAD found the Minister did meet their burden, the outcome would have been the same had the burden been placed on the Applicant. For the same reason, the proposed question does not transcend the interests of the immediate parties to the litigation.

[105] As to the second question, the Applicant submits that SH "is an adverse interest witness" and that her "many **sworn** allegations against the Applicant could foreseeably place her in a position of civil or criminal liability". The Applicant submits that the ID decided that the Applicant is inadmissible for misrepresentation, solely based on SH's statements and the resulting inferences made by immigration officers who cited no other evidence to corroborate her claim that the Applicant entered into a marriage of convenience for the purpose of obtaining

permanent resident status. The findings of the investigators and the ID were imported into the IAD's analysis.

[106] The Respondent submits that the question assumes without any jurisprudential authority that the evidence of an adverse party is unreliable or not credible just because their interests do not align with those of the person concerned. It ignores that a critical role of the IAD, like any trier of fact, is to asses the credibility of witnesses and their evidence. To require that the IAD should have rejected SH's evidence simply because she set in motion the admissibility proceeding is to strip the ID and IAD of their ability to assess divergent accounts, prefer one over the other, and to provide cogent reasons for their preference. The question further assumes, without any authority, that it is impossible for a trier of fact to assess the reliability and veracity of a witness' evidence absent corroboration. In any event, the question will not be dispositive of the appeal given the IAD's detailed assessment of the competing evidence and reasons for preferring SH's evidence on the crucial issues.

[107] I agree with the Respondent. The proposed question ignores the issue of the credibility of the evidence of the "adverse witness", and the credibility of other witnesses. In every case, it is the responsibility of the finder of fact to assess credibility and weigh the evidence. Whether corroborative evidence is required or not is fact specific – it depends on the circumstances of the matter before the decision maker. I would also observe that the submission by counsel for the Applicant that the "many **sworn** allegations against the Applicant could foreseeably place her in a position of civil or criminal liability" is inflammatory, unnecessary and unsupported.

[108] Accordingly, I decline to certify the questions proposed.

JUDGMENT IN IMM-3303-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. The Applicant's proposed questions for certification are refused.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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