Federal Court  Cour fédérale

Date: 20210121

Docket: IMM-5660-19

Citation: 2021 FC 68

Ottawa, Ontario, January 21, 2021

PRESENT: Mr. Justice McHaffie

BETWEEN:

NANA AKYAA KUSI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Nana Akyaa Kusi sponsored her husband, Andy Morrison, for permanent residence as a member of the family class. The Immigration Appeal Division (IAD) refused Mr. Morrison's application for a permanent resident visa because it found their marriage was not genuine. Despite the couple's children and other positive evidence, the IAD concluded the cumulative effect of significant and unexplained material inconsistencies and gaps in the couple's testimony tipped the balance of probabilities against the genuineness of the marriage.

[2] Ms. Kusi challenges the IAD's decision on this application for judicial review. She argues the IAD failed to recognize the cultural significance of the traditional marriage ceremony the couple undertook in Ghana, focused unduly on discrepancies that may simply have been due to fading memories or different perceptions, and gave insufficient weight to the children of the marriage. Ms. Kusi also alleges the IAD's decision was unfair, as it failed to accommodate her when she was having difficulties during the hearing.

[3] I conclude the IAD's decision was reasonable and fair. Ms. Kusi did not put to the IAD the arguments or evidence she now presents to the Court on Ghanaian cultural norms regarding marriage. In such circumstances, the IAD cannot reasonably have been expected to identify and focus on such arguments. I agree that the IAD referred to some asserted inconsistencies that were trivial or unsupported by the record. However, the Court must not engage in an overly microscopic view of credibility findings, and I cannot conclude the IAD's overall assessment of the credibility of the parties and the genuineness of the marriage was unreasonable. Nor do I find the IAD failed to adequately consider or weigh the presence of the children. Although the IAD did not specifically refer to the presumption of genuineness of a marriage that has resulted in children that this Court has recognized, it stated the children were "strong evidence" of genuineness. In the context of the decision as a whole, this analysis was reasonable. Finally, in the absence of any request for accommodation or argument to the IAD on the fairness ground, I cannot conclude there was any unfairness in the proceeding.

[4] The application for judicial review is therefore dismissed. Although Ms. Kusi asked that I certify a question related to cultural norms regarding marriage, I decline to do so as I conclude the proposed question does not meet the requirements for certification.

II. Issues and Standards of Review

[5] Ms. Kusi's challenges to the IAD's decision raise the following issues:

A. Was the IAD's conclusion regarding the genuineness of the marriage unreasonable, and in particular, did the IAD err:

   (1) by failing to adequately consider Ghanaian cultural norms regarding marriage;

   (2) by making improper credibility findings; and/or

   (3) in its treatment of the evidence regarding the couple's children?

B. Was the hearing leading to the IAD's decision unfair?

[6] As the parties agree, the first of these issues goes to the merits of the genuineness decision and attracts the reasonableness standard of review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Valencia v Canada (Citizenship and Immigration)*, 2011 FC 787 at para 15. To assess the reasonableness of a decision, the Court considers "the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified": *Vavilov* at para 15. A reasonable decision is one "based on an internally coherent and rational chain of analysis" and that is "justified in relation to the facts and law that constrain the decision maker":

Vavilov at paras 85, 90, 99, 105–107. The Court is to assess the decision as a whole, and should not seize on a "minor misstep" or peripheral flaw, nor engage in a "line-by-line treasure hunt for error": *Vavilov* at paras 15, 85, 100, 102. Rather, the Court "must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" before setting aside a decision as unreasonable: *Vavilov* at paras 99–100.

[7] The second issue is one of procedural fairness. Such issues are reviewed by asking whether a fair and just process was followed, having regard to all of the circumstances: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. This reviewing exercise is "best reflected in the correctness standard," although no standard of review is actually being applied: *Canadian Pacific* at para 54, quoting *Eagle's Nest Youth Ranch Inc v Corman Park (Rural Municipality #344)*, 2016 SKCA 20 at para 20.

III. Analysis

A. *The IAD's Decision was Reasonable*

[8] Mr. Morrison applied for a permanent resident visa as a member of the family class, sponsored by his spouse, Ms. Kusi, pursuant to paragraph 117(1)(*a*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]. Subsection 4(1) of the *IRPR* states that a foreign national will not be considered a spouse if the marriage was not genuine, or was entered into primarily for the purpose of acquiring a status or privilege under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]:

Bad faith	**Mauvaise foi**
4 (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership	**4 (1)** Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :
(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or	**a)** visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;
(b) is not genuine.	**b)** n'est pas authentique.

[9] The onus is on an applicant to prove, on a balance of probabilities, that the sponsored spouse is not excluded under either paragraph 4(1)(*a*) or (*b*): *Khera v Canada (Citizenship and Immigration)*, 2007 FC 632 at para 7. The test under subsection 4(1) is disjunctive—a finding either that the marriage was entered into primarily to acquire status *or* that it is not genuine, will disqualify an applicant: *Idrizi v Canada (Citizenship and Immigration)*, 2019 FC 1187 at paras 25–26. Although the matter is brought to the IAD as an appeal from an adverse decision of an immigration officer, the IAD conducts a *de novo* hearing based on the evidence presented to it to assess the applicability of subsection 4(1): *Khera* at para 7; *IRPA*, ss 63(1), 67.

[10] The IAD concluded that Ms. Kusi and Mr. Morrison's marriage was not genuine based on its finding that there were significant gaps in the evidence and inconsistencies in the testimony given by each member of the couple. This included gaps in the testimony about how their relationship developed, inconsistencies in accounts regarding family meetings and marriage

counseling, and conflicts in the parties' evidence regarding issues such as whether Mr. Morrison's adult children from an earlier relationship lived with him. While referring to positive evidence that would support the genuineness of the marriage, including the two daughters the couple had and their expectation of a third child, the IAD concluded the positive factors did not outweigh the significant concerns raised by the inconsistencies in the evidence. In light of its genuineness finding, the IAD did not address whether the marriage had been entered into primarily to acquire status under the *IRPA*.

[11] Ms. Kusi raises three main challenges to the reasonableness of the IAD's decision: (1) she alleges the IAD failed to adequately consider Ghanaian cultural norms regarding marriage; (2) she argues the IAD's credibility findings were unjustified, relying on minor differences in accounts that are readily explicable; and (3) she argues the IAD did not take adequate account of the fact that the couple had children. Ms. Kusi raised a further argument in her memorandum that her evidence to the IAD may have been affected by a medical condition described as "baby brain," but this argument was abandoned at the hearing of this application.

[12] For the reasons below, I am not persuaded that any of the three challenges pursued by Ms. Kusi demonstrate the IAD's decision was unreasonable.

(1) The IAD did not unreasonably fail to consider Ghanaian cultural norms

[13] Ms. Kusi argues that in Ghanaian marriage tradition, the role of each party's family is of central importance. She notes that a Ghanaian marriage amounts to the establishment of a permanent relationship between two families rather than simply two individuals, and that the

IAD failed to consider the importance of Mr. Morrison having asked her family's permission to marry her and the subsequent investigations conducted by the families. In support of this argument, Ms. Kusi filed an affidavit on this application for judicial review that set out her own understanding of Ghanaian customary marriage and attached two articles on the subject. She points to this Court's decision in *Gill (2010)*, where Justice Barnes noted the importance of not applying western marriage expectations when assessing the genuineness of a marriage from other customs, in that case an Indian arranged marriage: *Gill v Canada (Citizenship and Immigration)*, 2010 FC 122 [*Gill (2010)*] at para 7; see also *Farid Khan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1490 at para 16.

[14] The primary difficulty with this argument is that these issues were not raised before the IAD. The articles on Ghanaian customary marriage were not filed with the IAD, and cannot now be added to the record on this application for judicial review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 18–20. Nor is there any indication that Ms. Kusi, who was represented by counsel at the IAD hearing, either presented evidence on the cultural importance of customary marriage or the relationship between the families, or made arguments on this issue. I note in the latter regard that the transcript of the IAD proceeding filed with the Court appears incomplete and does not include all of counsel's final submissions, but at the hearing of this application, Ms. Kusi confirmed she was not relying on any arguments about what the "missing" pages of the transcript contained.

[15] Ms. Kusi and Mr. Morrison did testify that they had a traditional wedding and a church wedding, and gave evidence about Mr. Morrison seeking permission from Ms. Kusi's family to marry her. However, despite making submissions regarding "all the evidence that strongly favours a finding of a genuine marriage," counsel's only reference to these issues was to note they had family meetings and had both a traditional and church wedding. No submissions and no evidence were filed regarding the particular importance of a customary wedding in Ghanaian culture, of the inter-familial relationship, or of Mr. Morrison having sought permission to marry her.

[16] As the Supreme Court of Canada noted in *Vavilov*, the reasonableness of a decision is to be assessed in light of the history and context of the proceedings, including the evidence and the submissions of the parties: *Vavilov* at paras 94, 125–128. Having failed to file evidence on, or even identify, the cultural significance of a customary marriage in Ghana for the IAD's consideration, Ms. Kusi cannot now fault the IAD for having failed to give consideration to that issue: *Vavilov* at para 94; *Access Copyright* at para 15; *Alberta (Information and Privacy Commission) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22–26. As the Minister points out, an appellant must convince the IAD, not this Court, that the marriage is genuine: *Ma v Canada (Citizenship and Immigration)*, 2010 FC 509 at para 32.

[17] Ms. Kusi argues that since the existence of a customary marriage had been raised, it was incumbent on the IAD to seek out information on the cultural significance of that marriage in order to fulfil its role as an expert tribunal. I disagree. The onus placed on an appellant before the IAD includes the onus to present sufficient evidence to satisfy the IAD that the marriage is

genuine: *Khera* at para 7; *Sandhu v Canada (Citizenship and Immigration)*, 2014 FC 1061 at para 24. Whether this is evidence of the significance of cultural norms, or other evidence that may be relevant to the determination, the IAD is not under an obligation to seek out additional evidence to support or understand an appellant's case.

[18] I recognize that, when raised, the cultural significance of a customary wedding may be a relevant positive factor in the overall assessment of genuineness. However, it is worth noting that in this case, issues of cultural significance had little to no bearing on many of the credibility findings made by the IAD. The importance of marriage in Ghanaian custom can have little impact on the assessment of two parties to a marriage giving, for example, very different evidence regarding whether the children of one of the spouses lives with them or not as a factual matter.

[19] I therefore cannot conclude that the IAD ignored evidence of the cultural significance of the traditional marriage ceremony and the union of the families, that it was unreasonable for the IAD not to have focused on this as a positive factor in assessing the genuineness of the marriage, or that the IAD inappropriately viewed the marriage through a western cultural lens.

(2) The IAD's credibility findings were reasonable

[20] Assessments of credibility are part of the fact-finding process. The Supreme Court in *Vavilov* reiterated that reviewing courts should not reweigh or reassess evidence: *Vavilov* at para 125. Credibility findings are described as being given "significant deference": *N'kuly v Canada (Citizenship and Immigration)*, 2016 FC 1121 at para 21. This does not change the

applicable standard of review, which remains that of reasonableness, but it emphasizes that within the reasonableness framework, decision makers are given considerable latitude in making credibility findings, which should not be disturbed lightly: *Amador Ordonez v Canada (Citizenship and Immigration)*, 2019 FC 1216 at para 6; *Vavilov* at paras 88–90.

[21] At the same time, credibility findings are not "immune from review," and must be clearly articulated and justified on the evidence: *N'kuly* at para 24; *Valère v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1200 at para 14. Adverse credibility findings should also not be based on a "microscopic examination" of issues irrelevant or peripheral to the claim: *Cooper v Canada (Citizenship and Immigration)*, 2012 FC 118 at para 4(d).

[22] Ms. Kusi notes that a number of the IAD's identified inconsistencies are readily and appropriately attributable to differing perspectives of an event or the passage of time and the fading of memories. For example, the IAD noted that in recounting their initial meeting in Ghana, Ms. Kusi remembered they enjoyed a snack from a street vendor, while Mr. Morrison did not include this aspect of the meeting in his evidence. The IAD also noted inconsistencies in respect of recollections of family discussions that occurred in 2010, some nine years before the hearing.

[23] On review of the transcript, I agree that some of the IAD's credibility findings are not supportable. For example, the IAD's identification of inconsistencies regarding who was present at Mr. Morrison's meetings with the Kusi family appears to have assumed there was a single meeting, when the evidence was that there were two. Similarly, I see no reasonable or relevant

inconsistency in the parties' evidence on why they filed a second sponsorship application instead of appealing the refusal of their first. In other areas, the IAD appears to have found inconsistencies on peripheral issues, such as who accompanied Mr. Morrison when he underwent DNA testing to prove his parentage of the children. However, these are just a few of the numerous inconsistencies and gaps identified by the IAD, which included direct conflicts on relevant questions such as the nature and frequency of the pre-wedding marriage counselling, when Ms. Kusi told Mr. Morrison about her first wedding, and whether Mr. Morrison's two adult children from his prior relationship lived with him.

[24] The IAD summarized these issues as follows:

> The unresolved inconsistencies throughout this hearing included some lesser details that can be attributed to fading of memory with the passage of time, but other details are more significant and it is the cumulative effect of material inconsistencies that tips the balance of probabilities against genuineness in the final analysis. The discrepancies in their testimony were not reasonably explained or resolved.

[25] In my view, the IAD's conclusion shows it was alive to the fact that testimony might be inconsistent because of memory issues, and that it should not unduly focus on minor issues. While I consider that it would be unreasonable to rely on some of the IAD's identified concerns, I cannot conclude the IAD's overall credibility assessment was unreasonable. In this regard, I note that while the IAD should not engage in a microscopic analysis of the evidence, I too should not engage in a microscopic analysis of the IAD's reasons: *Cortez v Canada (Citizenship and Immigration)*, 2016 FC 800 at para 43. As the Supreme Court stated, flaws that are merely superficial, peripheral or amount to a "minor misstep" do not render a decision unreasonable: *Vavilov* at para 100.

(3) The IAD reasonably considered the children of the marriage

[26] Ms. Kusi argues the IAD gave inadequate consideration to the fact she and Mr. Morrison are the parents of two daughters. While conceding that the presence of children does not automatically demonstrate a marriage is genuine, she argued it was unreasonable for the IAD to rely on the credibility issues described above since there are two children and since the refusal means they will be deprived of their father's presence.

[27] In *Gill (2010)*, Justice Barnes noted the importance of children in an assessment of the genuineness of a marriage, stating the following at paragraph 8 of his decision:

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

[28] While the IAD did not refer to an "evidentiary presumption" arising from the children, it did recognize that "[t]he existence of children from the marriage is strong evidence in favour of the Appellant" [emphasis added]. This is consistent with later decisions of this Court considering *Gill (2010)* and the importance of children in a genuineness assessment: *e.g.*, *Gill v Canada (Citizenship and Immigration)*, 2014 FC 902 at para 15. I conclude that the IAD's recognition

that the presence of children is strong evidence of genuineness is consistent with the precedential "legal constraints" on the decision: *Vavilov* at paras 99–101, 111–112.

[29] Ms. Kusi argues that having recognized the importance of children in the genuineness assessment, it was unreasonable for the IAD to conclude this was outweighed by its other credibility conclusions. However, the weighing of evidence and factors in support of a genuineness determination is the role of the IAD. This Court must refrain from reweighing the evidence, and can intervene only when the assessment of evidence is unreasonable: *Vavilov* at para 125. Here, the IAD reviewed both positive and negative factors, and Ms. Kusi has not convinced me the IAD's weighing of the evidence was unreasonable.

[30] Ms. Kusi also argues the IAD's assessment should have taken the best interests of the children (BIOC) into account, and that the IAD's emphasis on credibility issues minimized the importance of the BIOC in the overall picture. I disagree that the assessment of genuineness is one that triggers or requires a BIOC assessment. Rather, it is a heavily factual determination based on a variety of factors, and not one that seeks to protect the best interests of children born of the marriage. The *IRPA* itself makes this distinction. While the IAD may consider humanitarian and compassionate (H&C) considerations including the best interests of a child directly affected in deciding whether to grant most appeals, the ability to consider H&C factors is expressly precluded in appeals relating to family class sponsorship refusals: *IRPA*, ss 63(1), 65, 67(1)(*c*).

[31] As Justice Near, then of this Court, noted in *Valencia*, "as long as the IAD draws inferences that are reasonably open to it based on the evidence, it is not appropriate for the Court to interfere, even had I been tempted to come to a contrary conclusion": *Valencia* at para 24; *Vavilov* at paras 15, 83, 100, 125. Despite Ms. Kusi's arguments, I conclude the IAD's genuineness finding was reasonably open to it and that its reasons were transparent, intelligible, and justified.

B. *The process leading to the decision was fair*

[32] Ms. Kusi also alleged there was procedural unfairness arising from the hearing before the IAD, pointing to her having to care for two children, and to concerns raised at the hearing that she was in discomfort from a pain in her leg. Ms. Kusi did not press these arguments at the judicial review hearing, as counsel fairly recognized that the alleged fairness issues were not raised with the IAD. In any event, I agree with the Minister that these arguments cannot succeed. Ms. Kusi made no request for accommodation that was refused by the IAD. To the contrary, the IAD invited Ms. Kusi to stand or move around to make herself comfortable. Having not raised any fairness concerns about the conditions of the hearing with the IAD, Ms. Kusi cannot now be heard to complain that the process was unfair: *Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 11.

IV. Certified Question

[33] At the hearing of this application, Ms. Kusi asked that I certify the following question as a serious question of general importance pursuant to subsection 74(*d*) of the *IRPA*:

> In circumstances where the culture and cultural norms form the basis of a marriage, is it incumbent on the tribunal assessing the genuineness of that marriage to inform itself as to the significance of the culture as it relates to marriage?

[34] To be certified pursuant to subsection 74(*d*), a question must (i) be dispositive of the appeal, (ii) transcend the interests of the parties; and (iii) raise an issue of broad significance or general importance: *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46. In my view, even if it could be considered dispositive, the proposed question does not meet the requirement that it transcend the interests of the parties and that it raise an issue of broad significance. The principle that the onus is on an appellant to the IAD to present the necessary evidence to satisfy the IAD of the genuineness of their marriage is well established and of long standing. In my view, raising a novel proposition that the IAD has an independent obligation to inform itself regarding the cultural significance of a marriage in circumstances where that evidence is not put forward by the appellant does not raise an issue of broad significance transcending the particular circumstances of this matter. I therefore decline to certify the proposed question.

[35] I also note that, as counsel for Ms. Kusi conceded, no prior notice of the certified question was given as required by this Court's *Practice Guidelines for Citizenship, Immigration, and Refugee Law Proceedings* dated November 5, 2018. Counsel for the Minister was therefore put to responding to both the request for and the wording of the proposed question extemporaneously. While I need not rely on this procedural lapse, I underscore the importance of the notice requirement to the orderly consideration by counsel and the Court of proposed certified questions.

V. Conclusion

[36] As Ms. Kusi has not established that the IAD's decision was unreasonable or unfair, the application for judicial review is dismissed. No question of general importance is certified.

JUDGMENT IN IMM-5660-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5660-19
STYLE OF CAUSE:	NANA AKYAA KUSI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

HEARING HELD BY VIDEOCONFERENCE ON AUGUST 5, 2020 FROM OTTAWA, ONTARIO (COURT) AND CALGARY, ALBERTA (PARTIES)

JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	JANUARY 21, 2021

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