Federal Court  Cour fédérale

Date: 20220223

Docket: IMM-1239-21

Citation: 2022 FC 252

Ottawa, Ontario, February 23, 2022

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

MARYAM DAHER ELIAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Elias seeks judicial review of a decision of the Immigration Appeal Division [IAD] rejecting her appeal of the decision of a visa officer to reject her application to sponsor her husband, Mr. Baiade, for permanent residence. The IAD found that Ms. Elias had failed to demonstrate that the marriage was genuine and was not entered into primarily to gain status or privilege under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], in large part because of a statement Mr. Baiade made in a separate visitor visa application.

[2] I am allowing Ms. Elias's application. The IAD's decision is unreasonable because it fails to set forth intelligible grounds for the primary concern that led it to dismiss Ms. Elias's appeal.

I. Background

[3] Ms. Elias was born in Lebanon but has been a Canadian citizen since 1996. She resides in Canada. She is now 58 years of age. She was previously married to Mr. Salah Talini. However, Ms. Elias says that they divorced according to Islamic law in 2009.

[4] When visiting Lebanon in early 2011, Ms. Elias began a romantic relationship with Mr. Baiade, who is her first cousin. Mr. Baiade, a stateless Palestinian, is now 34 years of age. They married in Turkey in December 2011.

[5] Ms. Elias filed a first sponsorship application in 2012. It was refused because the religious divorce from her first husband was not considered to have effect in Canadian law and, as a result, the marriage with Mr. Baiade was invalid.

[6] Ms. Elias obtained a civil divorce from Mr. Talini in 2013. She made a second sponsorship application in 2015, which was also refused because the civil divorce obtained in 2013 could not retroactively validate the 2011 marriage.

[7] Ms. Elias and Mr. Baiade divorced in 2018 and remarried in 2019. She made a third sponsorship application, which was again refused, this time because the visa officer was not satisfied that the marriage was genuine and not entered into for immigration purposes.

[8] Ms. Elias appealed to the IAD. Her appeal was dismissed. The IAD described the case as "borderline." Although it noted positive factors, including Ms. Elias's and Mr. Baiade's knowledge of each other, their persistence in repeatedly applying for sponsorship over a number of years and Ms. Elias's frequent visits to Lebanon, it found that there was a lack of evidence of cohabitation during the visits, insufficient evidence of communication and little specificity in answering questions about why they were compatible. A critical negative factor was that, unbeknownst to Ms. Elias, Mr. Baiade applied for a visitor visa in 2011, for the purposes of visiting Ms. Elias and Mr. Talini. This, according to the IAD, raised concerns as to Mr. Baiade's motives.

II. Analysis

[9] This cases hinges upon section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, which reads as follows:

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	**a)** visait principalement l'acquisition d'un statut ou

any status or privilege under the Act; or	d'un privilège sous le régime de la Loi;
(b) is not genuine.	**b)** n'est pas authentique.

[10] Thus, Ms. Elias had to prove two separate things: that the marriage was genuine and that it was not entered into for immigration purposes. The two criteria are distinct, although the same facts can be relevant for both. Ms. Elias argues that the IAD unreasonably failed to distinguish the two criteria in its analysis. I disagree. When the IAD's reasons are read in their entirety, it is clear that the main basis for the decision is the concerns regarding Mr. Baiade's motives for entering into the marriage.

[11] Nevertheless, I find the decision to be unreasonable because of its treatment of Mr. Baiade's 2011 visa application

A. *The 2011 Visitor Visa Application*

[12] The IAD relied heavily on a statement made by Mr. Baiade in his September 2011 application for a visitor visa. According to a computerized summary of the application, Mr. Baiade indicated that he wished to "visit my cousin and her family." GCMS notes made by the officer who reviewed the application indicate that Mr. Baiade intended to visit "Maryam and Salah Talini." Notes made by the officer who reviewed the 2012 application also mention that the 2011 application was for visiting Maryam and Salah Talini. While the original visa application was not in evidence before the IAD, it was reasonable to assume that it contained a statement that the purpose of the trip was to visit Maryam and Salah Talini, as the visa officers could not have invented these names.

[13] The difficulty with this statement, of course, is that, according to the story Ms. Elias and Mr. Baiade put forward, she was already divorced from Mr. Talini in September 2011, and her romantic relationship with Mr. Baiade had begun a few months earlier. When questioned about why he indicated Mr. Talini's name as a person he would visit, Mr. Baiade could not offer any explanation, beyond the fact that he received assistance from his father and a paid consultant to fill out the application.

[14] From these facts, the IAD drew the following conclusions:

> [Mr. Baiade's] inability to provide an explanation for his intentions with respect to the 2011 visitor visa application raise a concern about his immigration motives in this case.
>
> […]
>
> Lastly, a critical issue hampering [Ms. Elias's] chance at success in this appeal is [Mr. Baiade's] 2011 visitor visa application, which raises a concern about his motives. [Mr. Baiade] was afforded an opportunity to address the concern about the 2011 visitor visa application and he was not able to provide a reasonable explanation.

[15] These findings are unreasonable for lack of justification.

[16] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paragraph 84 [*Vavilov*], the Supreme Court of Canada insisted on the centrality of the reasons given by the decision-maker in the judicial review process:

> A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion […].

[17] The Court also stressed that it is not enough for a decision to be justifiable, it needs to be justified: *Vavilov*, at paragraph 86. In other words, even though the reviewing court must seek to understand the reasons in light of the whole record, it cannot make a finding that the decision-maker failed to express. The Court explained, at paragraph 96:

> Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision.

[18] The above-quoted passages of the IAD's decision constitute the totality of its reasons regarding the 2011 visitor visa application. They provide little insight into the reasons for the IAD's critical finding.

[19] One interpretation of the IAD's reasons is that it made a negative finding with respect to Mr. Baiade's credibility. But neither the reasons nor the consequences of this finding are spelled out. We do not know whether the IAD turned its mind to potential innocent explanations for this apparent contradiction, especially as Mr. Baiade testified that he was assisted by a consultant in filling out the application.

[20] Justifying this finding is particularly important as it plays a determinative role in the IAD's decision. The IAD itself described the matter as a "borderline case" and the 2011 visitor visa application as a "critical issue." The Federal Court of Appeal said long ago that credibility findings must be made in "clear and unmistakable terms": *Hilo v Canada (Minister of Employment and Immigration)* (1991), 15 Imm LR (2d) 199 (FCA). This is no less relevant

today, in light of *Vavilov*'s insistence on justification. Here, we are left to speculate as to why a single incongruous statement overwhelms the rest of the evidence, which tends to support the genuineness of the relationship.

[21] Providing adequate justification is even more strongly required given what is at stake in this case. In *Gill v Canada (Citizenship and Immigration)*, 2010 FC 122 at paragraph 6, Justice Barnes warned that, when deciding upon the genuineness of a marriage, the IAD "must proceed with great care because the consequences of a mistake will be catastrophic to the family." In the same vein, the Supreme Court of Canada wrote, in *Vavilov*, at paragraph 133: "Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes." What is at stake here is the ability of a couple who have been in a relationship for ten years to reunite. The short reasons quoted above fall far short of the mark.

B. *Lack of Corroboration and Insufficiency of Evidence*

[22] The IAD also found that Ms. Elias had not brought sufficient evidence showing that she cohabited with Mr. Baiade when visiting Lebanon and that they remain in frequent contact when she is in Canada. In other words, the IAD found that there was not enough evidence to corroborate Ms. Elias's and Mr. Baiade's testimony on these topics.

[23] The IAD found that there was insufficient evidence that Ms. Elias and Mr. Baiade are in frequent communication. Yet, the record contains about 50 pages of screen shots showing communications by WhatsApp or other phone and messaging applications, apparently in 2015

and 2019. The IAD discounted this evidence because it was in Arabic and not translated. Yet, what is relevant is the frequency of communication, not its contents.

[24] The IAD also found there was no corroborating evidence that Ms. Elias and Mr. Baiade live together when she is in Lebanon. While they testified that they rented an apartment, the IAD noted that they failed to provide any receipt or other written evidence. Yet, this overlooks Mr. Baiade's testimony, who said that he paid the owner in cash and there was no receipt.

[25] While these issues may not independently render the IAD's decision unreasonable, they further erode its reasonableness.

III. Disposition

[26] As the IAD's decision is unreasonable, the application for judicial review will be granted and the matter will be remitted to a different panel for reconsideration.

JUDGMENT in IMM-1239-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision of the Immigration Appeal Division dated February 8, 2021 is quashed.
3. The matter is remitted to a different member of the Immigration Appeal Division for redetermination.
4. No question is certified.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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