Federal Court  Cour fédérale

**Date: 20220329**

**Docket: IMM-5389-20**

**Citation: 2022 FC 433**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, March 29, 2022**

**PRESENT: The Honourable Madam Justice Roussel**

**BETWEEN:**

**MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Applicant**

**and**

**NADIA HABTI**

**Respondent**

# JUDGMENT AND REASONS

## I. Background

[1] The applicant, the Minister of Citizenship and Immigration, is seeking judicial review of an October 13, 2020, decision of the Immigration Appeal Division [IAD], allowing the appeal of the respondent, Nadia Habti, from a decision of the Immigration Division [ID].

[2] The respondent is a citizen of Morocco. In 2009, via the Internet, she met her first husband, KK, a Canadian citizen of Moroccan origin. They met in person for the first time in July 2010, a few days before their wedding. KK returned to Canada, and the couple kept in touch by phone and online. An application for permanent residence in the family class, sponsored by KK, was filed in November 2010. A visa was issued on May 13, 2011, expiring on August 4, 2011.

[3] In late June 2011, KK travelled to Morocco to pick up the respondent. By mid-July 2011, communication between the spouses ceased for conflicting reasons.

[4] The respondent left for Canada on July 26, 2011, and upon arrival was granted permanent residence under the family class. Shortly after arriving in Canada, KK filed for divorce in Morocco, which was granted in August 2011.

[5] KK then reported the respondent to the Canadian immigration authorities. An inadmissibility report for misrepresentation was prepared by an immigration officer. The officer was of the opinion that the respondent entered into or continued a marriage of convenience with KK for the purpose of obtaining permanent residence in Canada. This report was then referred for an admissibility hearing before the ID.

[6] In a decision dated September 28, 2018, the ID found the respondent inadmissible for misrepresentation under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], and issued an exclusion order against her. It found the respondent's

testimony to be not very credible, noting numerous inconsistencies in her testimony, particularly with respect to the circumstances surrounding her marriage and her break-up with her sponsor, KK.

[7] The respondent then filed a notice of appeal against the ID decision. She challenged the validity of the inadmissibility and argued that there are sufficient humanitarian and compassionate grounds.

[8] In its reasons, the IAD found that the evidence shows the respondent married KK for the primary purpose of obtaining permanent residence in Canada and that her fraudulent marriage resulted in an error in the application of IRPA, as she obtained permanent residence when she was not a family member of her sponsor. However, she found that there are humanitarian and compassionate grounds for appeal and therefore allowed the respondent's appeal.

[9] As such, the IAD recognized that the respondent's misrepresentations are very serious, because she betrayed KK's trust and misled immigration authorities. It called them a "head-on attack on the integrity of the Canadian immigration system" and stated that this is a "negative factor that weighs very heavily in the balance". It then pointed out that the respondent expressed no sincere remorse for her actions, except for failing to notify authorities of her change of status and for not returning to Morocco until she had children in Canada and responsibilities. The IAD stated that "[t]hese regrets ring completely hollow", adding that the respondent regrets, rather, the unfortunate position she finds herself in today. The IAD stated that the respondent's expressions of regret did not weigh favourably in the appeal. Furthermore, the IAD considered

the respondent's establishment to be limited and her employment income to be quite modest. It gave little weight to these factors. Finally, it found that the respondent has not demonstrated the hardship she would suffer if removed from Canada.

[10] The IAD was of the opinion that the respondent's family ties in Canada weighed heavily in the balance. First, it determined that the removal of the respondent would have difficult and unfair repercussions for the respondent's new spouse, MB, a Canadian citizen of Moroccan origin, since he was unaware of his wife's immigration problems at the time of the marriage. It added that he could not foresee, at that time, the consequences to which he was exposed, namely a possible separation from his children, or a return to Morocco to accompany the respondent, a country he left more than 21 years ago, which would mean having to leave behind the life he had built in Canada and his mother, who lives with him. The IAD was of the opinion that the respondent's relationship with her husband in Canada and the impact that his removal would have on him are very favourable factors in assessing humanitarian and compassionate considerations.

[11] Secondly, the IAD pointed out that the best interests of the two Canadian-born children is the factor that weighs most heavily in favour of the respondent. It stated that their father is well established in Canada and is their main financial supporter. It added that the children have lived with their two parents and their paternal grandmother since their birth. The IAD noted that the respondent testified that if she were deported from Canada, she would not be able to abandon her children, implying that she would take them with her. The IAD stated that this situation was unclear, since MB stated that he could not contemplate moving to Morocco and did not want to

abandon his children. The IAD found that it is in the best interests of the children that the respondent be allowed to stay in Canada with them so that they can benefit from the presence of both parents.

[12] The IAD found that while the positive factors in favour of the respondent are very limited, the misrepresentations are very serious and the respondent did not acknowledge responsibility, the presence of the husband in Canada and the best interests of the children still weighed in favour of the respondent. Despite the seriousness of the respondent's actions, the IAD found that there are sufficient humanitarian and compassionate grounds to warrant special relief. It therefore allowed the respondent's appeal.

[13] The applicant criticized the IAD's finding as to the impact that the removal of the respondent would have on MB, the respondent's second husband. The applicant also criticized the IAD for giving pre-eminence to the best interests of the children, without explaining why this factor would be determinative in allowing the appeal.

## II. Analysis

[14] The parties agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16–17 [*Vavilov*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 58 [*Khosa*]).

[15] When the reasonableness standard applies, the Court is concerned with "the decision actually made by the decision maker, including both the decision maker's reasoning process and

the outcome" (*Vavilov* at para 83). It must consider 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).

A. *Impact on MB*

[16] The applicant criticized the IAD's finding that MB could not have foreseen, at the time of his marriage on June 3, 2016, the consequences to which he was exposed, namely a possible separation with his children or a return to Morocco to accompany the respondent. According to the applicant, the respondent's immigration problems were known to her as early as March 9, 2016, when she was called in for an interview by letter with the subject line [TRANSLATION] "Misrepresentation". The respondent then forwarded a letter and photos from her marriage to KK, explaining the circumstances of her marriage and divorce. The applicant argued that the issues surrounding the validity of the marriage to KK were known to the respondent prior to her marriage to MB and, in the event that MB was unaware of them, the liability remains with the respondent for failing to inform him. The applicant argued that it is incongruous for the respondent to take advantage of her failure to be transparent with MB.

[17] The respondent argued that she believed the interview letter was related to her citizenship application. She alleged that she could not have known the severity of her immigration problems at the time she received the letter dated March 9, 2016, or at her interview in late March 2016. It was not until September 26, 2016, that she learned the nature of the allegations against her. The same is true of her husband, MB. She argued that the applicant assumes that MB should have

known the severity of the respondent's problems, regardless of the record. The respondent argued that the applicant is essentially asking the Court to reweigh the evidence and give more weight to the misrepresentations than to the factors in her favour.

[18] The Court recognizes that it is the IAD's role to analyze the impact of the respondent's removal on family members. However, it finds the IAD's analysis on this point fundamentally flawed.

[19] Although the respondent's letter is undated, the Court notes that it explicitly refers to the March 30, 2016, interview. A reading of this letter demonstrates that the respondent is attempting to establish that she was acting in good faith in her marriage to KK. Even if she believed that the interview was related to her citizenship application, the fact remains that the interview letter clearly states that the interview would be dealing with false statements. It is therefore difficult to imagine that she did not breathe a word of this to MB, whom she would marry a few months later.

[20] Moreover, even assuming that MB was unaware following the IAD's finding, the Court agrees with the applicant that it is illogical for the respondent to benefit from her failure to be transparent with MB. The IAD seems to imply that the failure to disclose her misrepresentations to her new spouse was a positive factor. Such a conclusion is likely to set a significant precedent. The Court is not convinced that the reasoning of the IAD represents "an internally coherent and rational chain of analysis" (*Vavilov* at para 85).

B. *Best interests of children*

[21] The applicant argued that the best interests of the children are one factor among others when it comes to humanitarian and compassionate grounds. He criticized the IAD for unjustifiably giving this factor pre-eminence over the negative factors and argued that MB's refusal to consider returning to Morocco is not determinative. He added that the IAD failed to take into account important elements in its analysis, such as the following: (1) the children are young; (2) they have not started schooling and there is no indication that they would not be able to do so in Morocco; (3) they have family members in Morocco and in due course will be able to create a network of friends. These elements are absent from the IAD's analysis.

[22] The respondent emphasized the importance of deference to the IAD's decisions. The IAD analyzed MB's personal situation and found that it was in the best interests of the children that the respondent be allowed to remain with them in Canada so that they could benefit from the presence of both parents. The respondent argued that the applicant extrapolated the option of going to live in Morocco with the family and that it sought to favour the punitive aspect rather than the best interests of the children.

[23] The Court recognizes that the best interests of the children is an important factor when considering humanitarian and compassionate grounds and, while not determinative, must be given considerable weight (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 38 [*Kanthasamy*]; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras. 74–75). While there is no specific formula or approach for analyzing the best interests of children, the analysis is highly contextual and must take into account the age of the children, their abilities, needs and maturity. The analysis may also include the level of

dependency on the exemption applicant or his or her sponsor, the degree of settlement in Canada, ties to the country for which the exemption application is being considered, conditions in that country, the special needs of the children, the impact on their education, and gender issues (*Kanthasamy* at para 35, 40).

[24] The best interests analysis for the children at issue is one paragraph long. The IAD noted that the respondent had suggested that she would take her children with her to Morocco if she were removed, as she could not abandon them. The IAD stated that this is uncertain, as MB had stated that he could not contemplate either moving to Morocco or abandoning his children. It therefore concluded that it is in the best interests of the children that the respondent be allowed to stay with them in Canada so that they can benefit from the presence of both parents.

[25] The Court finds this analysis unreasonable, as it is lacking in sufficient justification and transparency. The best interests of the children cannot rest solely on the parents' choices. The mere fact that MB cannot consider moving to Morocco or that the respondent implies that she could not abandon her children cannot be decisive, such that a thorough analysis of the best interests of the children can be avoided. Apart from the fact that they have lived with their two parents and their paternal grandmother since their birth, there is no personalized and contextual analysis of the best interests of the children.

[26] The Court recognizes that the IAD's findings are entitled to deference and that it is not for the Court to weigh the various humanitarian and compassionate grounds (*Vavilov* at para 125; *Khosa* at para 59). However, it is of the view that the IAD's decision does not have the

characteristics of a reasonable decision, being insufficiently justified and not based on an internally coherent and rational chain of analysis (*Vavilov* at paras 85, 99).

[27] For these reasons, the application for judicial review is allowed. The decision is set aside, and the matter is sent back to the IAD for reconsideration by a differently constituted panel.

[28] No question of general importance is certified, and the Court is of the opinion that there are none in this case.

**JUDGMENT in IMM-5389-20**

**THE COURT'S JUDGMENT is as follows:**

1. The application for judicial review is allowed.

2. The Immigration Appeal Division's decision dated October 13, 2020, is set aside.

3. The case is sent back to the Immigration Appeal Division for reconsideration by a differently constituted panel.

4. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

Certified true translation
Michael Palles

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-5389-20 |
| **STYLE OF CAUSE:** | MINISTER OF CITIZENSHIP AND IMMIGRATION v NADIA HABTI |
| **PLACE OF HEARING:** | HELD VIA VIDEOCONFERENCE |
| **DATE OF HEARING:** | FEBRUARY 9, 2022 |
| **JUDGMENT AND REASONS:** | ROUSSEL J. |
| **DATED:** | MARCH 29, 2022 |

**APPEARANCES:**

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| Claudia Andrea Molina | FOR THE RESPONDENT |

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