Immigration and
Refugee Board of Canada

Immigration Appeal Division

Commission de l'immigration
et du statut de réfugié du Canada

Section d'appel de l'immigration

2018 CanLII 46480 (CA IRB)

IAD File No. / N° de dossier de la SAI: TB6-02321
Client ID No. / N° ID client: 5447-7663

Reasons and Decision – Motifs et décision

SPONSORSHIP

Appellant(s)	MY THUY VAN VAN	**Appelant(e)(s)**
and		**et**
Respondent	The Minister of Citizenship and Immigration Le ministre de la Citoyenneté et de l'Immigration	**Intimé(e)**
Date(s) of Hearing	August 15, 2017 November 27, 2017 March 15, 2018	**Date(s) de l'audience**
Place of Hearing	Toronto, Ontario	**Lieu de l'audience**
Date of Decision	March 15, 2018	**Date de la décision**
Panel	Maureen Kirkpatrick	**Tribunal**
Counsel for the Appellant(s)	Isabella Kowalewski Phong Duong	**Conseil(s) de l'appelant(e) / des appelant(e)(s**
Designated Representative(s)	N/A	**Représentant(e)(s) désigné(e)(s)**
Counsel for the Minister	Camille Kuchmij	**Conseil du ministre**

Canada

ORAL REASONS FOR DECISION

INTRODUCTION AND ISSUE

[1] These are my oral reasons in the sponsorship appeal of My Thuy Van Van, who appeals[1] the refusal of the sponsorship of her spouse, Ho Hai Nguyen, the applicant.[2] The applicant applied for permanent residence and the appellant applied to sponsor the applicant as a spouse in August 2014.[3] The appellant and the applicant have twin children, Daniel Hai Dang Nguyen and Miah Hai My Nguyen, born in Canada on July 17, 2015.[4] They married in Vietnam on November 26, 2010;[5] a second marriage for them both.

[2] The appellant is a 36-year-old Canadian citizen,[6] born in Vietnam.[7] She entered Canada as an international student in 2004, married her first husband in Canada in August 2005, was sponsored by him, and became a Canadian permanent resident in November 2006.[8] She and her first husband divorced in 2008.[9] No children were born of her first marriage. The appellant has studied accounting in Canada, and is currently working as a nail technician in Edmonton, Alberta, where she currently lives with her children, Daniel and Mia.[10]

[3] The applicant is a 36-year-old Vietnamese citizen,[11] who has lived all his life in Vietnam, with the exception of approximately ten years in Canada (September 2000 to March 2010).[12] He entered Canada as an international student in September 2000, and married his first wife, in

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[1] Section 63(1), *Immigration and Refugee Protection Act* (*IRPA*), SC 2001, c 27. See also Exhibit R-1, pp. 1-2 for the appellant's Notice of Appeal, signed and dated by the appellant in Ho Chi Minh City on February 12, 2016.
[2] Exhibit R-1, pp. 3-5 for the immigration officer's refusal letter to the appellant, dated January 13, 2016; pp. 6-7 for the immigration officer's refusal letter to the applicant, dated January 13, 2016; and pp. 26-29 for the immigration officer's notes.
[3] Exhibit R-1, p. 25, noting the lock-in date of August 27, 2014.
[4] Exhibits A-2, pp. 18-23 and A-3, pp. 1-3 for DNA test results, and Exhibit R-1, pp. 100-103 for their children's birth certificates and Canadian passports.
[5] Exhibit R-1, pp. 119-120 for the registration of the appellant/applicant's marriage.
[6] Exhibit R-1, p. 109 and Exhibit A-2, p. 1 for the appellant's Canadian passport. See also Exhibit R-1, p. 146 for confirmation of her Canadian citizenship.
[7] Exhibit A-2, p. 2-5 for the appellant's former Vietnamese passport.
[8] Exhibit R-1, pp. 135-145 for her immigration history in Canada.
[9] Exhibit R-1, p. 111 for her divorce certificate.
[10] Exhibit A-2, pp. 57-61 for her employment and pp. 62-68 for her bank statements and pp. 69-75 for her mortgage. See also Exhibit A-4, p. 15 for a more recent pay stub.
[11] Exhibit R-1, p. 104 and Exhibit A-2, pp. 6-8 for the applicant's Vietnamese passport.
[12] Exhibit R-1, p. 161 for the immigration officer's notes confirming his entry to Canada as a student in 2000, and his departure from Canada on March 4, 2010; and see also pp. 155-156 for his confirmation of departure.

2018 CanLII 46480 (CA IRB)

Canada, in April 2005. His first wife applied to sponsor him as a permanent resident to Canada; the application was refused in September 2006.[13] In November 2006, he made a refugee claim in Canada; he was under a departure order, pending the determination of his refugee claim.[14] Under the strain of the failed sponsorship application and his indeterminate status in Canada, he testified that he and his first wife separated. There were no children from his first marriage. In June 2009, his refugee claim was refused; his departure order was then in effect.[15] In November 2009, he waived an application for a Pre-Removal Risk Assessment.[16] In February 2010, he and his first wife formally dissolved their marriage.[17] On March 4, 2010, the applicant left Canada, confirming his departure with Canadian immigration authorities.[18] The applicant has since remained in Vietnam, and works in Vietnam in the construction industry.

2018 CanLII 46480 (CA IRB)

[4] The issue in this appeal is whether the appellant has met the burden of demonstrating, on a balance of probabilities, that the marriage is genuine and was not entered into primarily to acquire any status or privilege under the *Immigration and Refugee Protection Act* (*IRPA*).[19]

[5] In refusing the application, the immigration officer noted a series of concerns:

- The officer concluded that their first marriages were marriages of convenience – the appellant's sponsorship was successful, and the applicant's sponsorship was not successful. As such, both the appellant and the applicant lacked credibility.
- The appellant and applicant claimed that they met at the registration line at Seneca College in September 2007; both were still married to their first spouses at that time.
- There is a strong motivating factor for the applicant to immigrate to Canada in that he had made an unfounded refugee claim to remain in Canada, and also married someone to remain in Canada previously. This also raises a serious question as to his credibility.
- The applicant did not take the interview very seriously. He provided glib responses and sometimes smiled inappropriately when serious questions were raised such as why they declared three dates for their proposal. When asked why there was a delay in registering the marriage (i.e. marriage took place on November 26, 2010 and was

[13] Exhibit R-1, pp. 26-29, and 161.
[14] Exhibit R-1, pp. 26.
[15] Exhibit R-1, pp. 147 and 150.
[16] Exhibit R-1, p. 153.
[17] Exhibit R-1, p. 113 where his marriage was dissolved by court order on February 17, 2010, and where the divorce takes effect on March 20, 2010.
[18] Exhibit R-1, p. 161 for the immigration officer's notes confirming his entry to Canada as a student in 2000, and his departure from Canada on March 4, 2010; and see also pp. 155-156 for his confirmation of departure.
[19] Section 4(1) of the *Immigration and Refugee Protection Regulations* (*IRPR*).

registered on May 13, 2011), he first attempted to avoid answering the question, and when pursued, simply stated that he did not remember the reason.

- Although his relationship with the appellant started in 2010, he demonstrated little interest in her past relationship. He provided only vague and regurgitated descriptions of what they had learned about each other during the period of time when they were in a serious relationship.
- The appellant stayed in Vietnam until 2014. She obviously took a short-term job in Canada in 2014 in order to submit the sponsorship.
- The appellant claims that she returned to Canada in 2015 to give birth to twins after having had fertility treatment.
- The officer was not satisfied that the applicant had demonstrated, on a balance of probabilities, that the marriage is genuine or that it was not entered into primarily for immigration purposes.[20]

2018 CanLII 46480 (CA IRB)

DECISION

[6] Appeals before the Immigration Appeal Division are hearings *de novo* and therefore are not limited to the information received by the immigration officer in processing the initial application. Because hearings at the IAD are held *de novo*, the IAD must consider the whole case, including any new evidence put before it (*Kahlon*,[21] *Gazi*[22]). The testimony provided at this hearing addressed the bulk of the concerns noted by the immigration officer. I find that the appellant has met her burden of proof, and, on the balance of probabilities, find that the marriage is genuine, and was not entered into primarily for an immigration purpose. The reasons below explain why the appeal is allowed.

ANALYSIS

Genuineness of marriage

[7] In addition to assessing the credibility of the appellant and the applicant, the factors listed in *Chavez* guide an assessment of the genuineness of a marriage, and include:

- intent of the parties to the marriage;
- length of the relationship;

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[20] Exhibit R-1, pp. 26-29.
[21] *Kahlon v. Canada (Minister of Employment & Immigration)*, [1989] FCJ No 104, 14 ACWS (3d) 81 at p. 3.
[22] *Gazi v. Canada (Minister of Immigration, Refugees and Citizenship)*, 2017 FC 993 at paras. 21-23.

- amount of time spent together;
- conduct at the time of the meeting, engagement and/or the wedding;
- behavior subsequent to the wedding;
- knowledge of each other's relationship histories;
- level of continuing contact and communication;
- financial support;
- knowledge of and sharing of responsibility for the care of children brought into the marriage;
- knowledge of and contact with extended families of the parties; and
- knowledge about each other's daily lives.[23]

2018 CanLII 46480 (CA IRB)

[8] The *Chavez* factors are not exhaustive and weight given to factors vary according to the circumstances of a case.

Development / Marriage / Contact and Communication / Knowledge / Support

[9] The appellant and the applicant both gave testimony at this hearing. Both were spontaneous witnesses who gave detailed descriptions of the development of their relationship which were, by and large, consistent with their application forms, and with one another. They met in the registration line at college in September 2007, became friends, had mutual friends, and did not begin a romantic relationship until much later, approximately during the Spring of 2009. Similarly, they provided consistent accounts of the appellant meeting the applicant at the airport when he returned to Vietnam in March 2010 (she having returned to Vietnam before him to visit her family). They provided consistent accounts of their engagement in Vietnam on April 1, 2010, their engagement ceremony on May 23, 2010, their wedding on November 26, 2010 and their reception on November 27, 2010, all of which were known to and celebrated with their immediate families, friends, and relatives.

[10] The appellant and the applicant are compatible in age and background, and demonstrated knowledge of one another's day-to-day lives in their testimony, including but not limited to their work, their previous studies in Canada, their previous marriages in Canada, their family

[23] *Chavez v. Canada* (*Minister of Citizenship and Immigration*), IAD TA3-24409.

relationships, their living arrangements, their children, and their common goals and plans for the future. Both testified to their lengthy period of cohabitation, and to the life they built together in Vietnam after their marriage. Specifically, they testified to living together in Vietnam for several years after their marriage, where both worked, and enjoyed time with their respective families after years of living abroad in Canada.[24] Both testified to wanting to start a family, having difficulties doing so, and to rounds of fertility treatment. Both testified to the appellant having returned briefly to Canada - in 2011 (for work), in 2014 (for work and to file the sponsorship application), and in 2015 (to give birth to their twins). Other than these short-term periods in Canada, the appellant lived in Vietnam with the applicant and later with the applicant and their children until March 2017, when she returned to Canada with the twins, to manage their appeal process, and to re-establish in Canada, with a view to the family settling permanently in Canada.

[11] After having considered all of the evidence in this matter, the Minister submitted that she was satisfied as to the paternity of the children, was satisfied that the marriage is genuine, and was also satisfied that with respect to this marriage, the appellant is genuine.

[12] Accepting the submissions of both the Minister and counsel for the appellant, I find, on a balance of probabilities, that Daniel and Mia are the children of this marriage, and that this is a genuine marriage. I find the development of their relationship credible and believable. The consistent accounts and supporting documents with respect to their marriage in Vietnam are also relevant and are indicative of this being a genuine marriage. I find that the appellant and the applicant are compatible, and have demonstrated an ongoing commitment to one another through a lengthy period of cohabitation in Vietnam after their marriage, ongoing communication, credible knowledge of the intimate details of one another's lives, and mutual emotional and financial support. They have intermingled their lives. On a balance of probabilities, their ongoing communication, knowledge of one another, and mutual support point to this marriage being genuine. In particular, the appellant and applicant provided credible testimony concerning their twin children, their ongoing daily long-distance communication (since March 2017) with and about their children, and the devastating effect that the family separation is having on these children. As above, I find that Daniel and Mia are children of this relationship, and also find that

[24] Exhibit A-1, pp. 7-21.

2018 CanLII 46480 (CA IRB)

their birth is strong evidence of this relationship being a genuine marriage. For all of these reasons, I find, on a balance of probabilities, that this is a genuine marriage.

ANALYSIS

Primary purpose of immigration status

[13] In assessing whether the relationship was entered into primarily for the purpose of acquiring any status or privilege under the *IRPA*, the focus is on the intention of one or both of the spouses when they entered into the marriage. If, for at least one spouse, the *primary* purpose of entering into the marriage is to gain an immigration advantage, the test will not be met. The test looks back to the time of entering into the marriage.

[14] The Minister submitted that both of their first marriages were marriages of convenience and were entered into by both the appellant and the applicant for the purposes of remaining in Canada permanently. The Minister is required to look at all of the evidence and information in this matter, including previous immigration histories. The Minister submitted that immigration histories – including, in this matter, previous marriages and sponsorships and a refugee claim by the applicant - in Canada tell a story, and, in this case, speak not only to the credibility of the applicant, but also to his motivation.

[15] In the Minister's view, every action taken by the applicant – since he arrived to Canada – has been to remain in Canada permanently. The Minister did not find the applicant's testimony that he wished to return and remain in Vietnam from 2010 to be credible. The Minister submitted that the plan was to marry, have a child in Canada, and to return to Canada. The only reason the applicant did not try to return to Canada earlier is because he and appellant were having difficulties getting pregnant. When the appellant became pregnant, they applied for him to come back to Canada. The Minister believes that the applicant intended to circumvent Canadian immigration laws, and that he entered into this marriage primarily for an immigration purpose.

[16] The appellant and the applicant both testified to marrying for love, and to build a life and a family together. Both asserted that they had a good life in Vietnam in the years after their marriage, and that it was only when the appellant became pregnant, and they turned their minds

2018 CanLII 46480 (CA IRB)

to their children's futures that they decided that their future – as a family – lay in Canada. At that point, they undertook efforts to return to Canada via the spousal sponsorship application. The appellant testified that if the primary purpose of their marriage was an immigration purpose, they would have married in Canada, and would have taken steps from within Canada for the applicant to have remained.

[17] With respect to the appellant's testimony surrounding the idea that the applicant could have remained in Canada to marry and to have had children, the Minister submitted that this would have been difficult because the applicant was under a removal order, and had to leave Canada.

[18] Counsel for the appellant stressed the fact that the appellant and the applicant have known each other for almost 11 years. The applicant complied with his departure order and left Canada in March 2010.[25] The appellant had left before him to visit her family in Vietnam, and they met when the applicant returned to Vietnam. The appellant gave up her life in Canada, and stayed in Vietnam to be with the applicant. They married in Vietnam, they fought for about five years to become parents, and they lived together in Vietnam for approximately seven years. The appellant initiated a sponsorship application for the applicant because they made a decision – after living together for several years in Vietnam – that they wanted to become parents, and for the sake of their children's future, they wanted that future to be in Canada. The appellant, along with their young twins, returned to Canada in 2017 in the anticipation that this appeal will be successful, and in the anticipation that the applicant will return to Canada to be reunited with her and their children. Counsel for the appellant submitted that it is not reasonable to conclude that the appellant and the applicant would have married in a big ceremony which lasted for two days and which involved their families, would have resided together for many years in Vietnam after their marriage, would have undergone grueling fertility treatments, and would have entered into the lifelong commitment of raising children together if this were simply a marriage of convenience.

[19] It is undisputed that the applicant has a complex immigration history in Canada, with both a previous marriage and a refugee claim in Canada. In addition, it is undisputed that the

[25] Exhibit R-1, pp. 155-157.

2018 CanLII 46480 (CA IRB)

applicant's first spouse submitted a sponsorship application on his behalf which was refused. The Minister asserted that the applicant married the appellant primarily in order to come to Canada, relying upon his past immigration history in Canada. I note that although past immigration history has been found by the Federal Court to be relevant in the determination of the primary purpose of a marriage, it is not determinative.

[20] The Minster asserted that it would have been difficult for the applicant and the appellant have married or had children in Canada given that he was under a removal order. I note that although the applicant was under a removal order, it was not in effect until June 2009 when his refugee claim was refused. Had the primary purpose of this relationship been an immigration purpose, there would have been time for both marriage and the conception of children between their initial meeting in September 2007 and June 2009. Instead, the applicant departed Canada in March 2010 for Vietnam, and they married several months later, in Vietnam, in November 2010.

[21] Counsel for the appellant argued persuasively concerning the appellant and the applicant's forthrightness with respect to their previous immigration histories in Canada. The applicant shared his immigration status with the appellant early on in the development of their relationship. As such, counsel for the appellant submitted that his intention in entering the relationship was his interest in the appellant, and not in immigration to Canada.

[22] Counsel for the appellant stressed the four-year delay in submitting the sponsorship application after their marriage. Counsel for the appellant referenced the appellant and the applicant's testimony that they were happy in Vietnam and it was only later that they decided that they preferred to live in Canada to raise their children, considering the best interests of their children. If the applicant's primary purpose in marrying the appellant was to gain entry to Canada, he would not have delayed the submission of the sponsorship application for four years and they would not have lived together and built a life together in Vietnam during those years. It is reasonable to assume that the applicant would be trying to get into Canada as quickly as possible if his primary purpose in marrying the appellant was an immigration purpose.

[23] Moreover, counsel for the appellant argued persuasively that marrying someone for immigration papers is not an act of intimacy, but is rather an act of manipulation and deception. I

2018 CanLII 46480 (CA IRB)

concur with counsel for the appellant that there is insufficient evidence to establish that the applicant has married for an immigration purpose, and has consequently manipulated and deceived the appellant. To the contrary, there was ample evidence of a committed and loving relationship between the appellant and the applicant, and to common goals and plans for the future, including reuniting their family.

2018 CanLII 46480 (CA IRB)

[24] As such, I do not concur with the Minister that the applicant's immigration history in Canada, including his previous marriage and his refugee claim, inevitably demonstrates that he has entered into this marriage primarily for an immigration purpose. Considering all of the evidence in this matter, I do not find that it logically follows that the applicant entered into this marriage primarily for an immigration purpose.

[25] I note that while I am looking also at the evidence relating to the behavior of the appellant and the applicant after the marriage took place, I am focused on the assessment of the applicant's intent at the time of the marriage; while the evidence overlaps, and is used for both tests, the tests are disjunctive tests and I am finding disjunctively.

[26] Though Minister's counsel asserted that the applicant married the appellant primarily in order to come to Canada, no persuasive evidence was submitted which supports the conclusion that the primary purpose of this marriage was an immigration purpose.

CONCLUSION

[27] The appellant and the applicant provided consistent accounts of the development of their relationship, and consistent accounts regarding their marriage in Vietnam, fertility treatments, and the birth of their twins, and have demonstrated their ongoing commitment to one another and to their children by living together in Vietnam for years, and by their ongoing daily long-distance communication as well as visits since March 2017,[26] their knowledge of each other's lives, and mutual support, to all of which I assign significant weight. As such, I find this marriage to be genuine. The Minister argued the applicant must have entered into this marriage primarily for an immigration purpose because of his adverse immigration history in Canada, including his previous marriage and his refugee claim. As noted above, when considering the evidence as a

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[26] Exhibit A-4, pp. 1-14.

whole, I do not find that the applicant's immigration history in Canada unavoidably establishes that he entered this marriage for an immigration purpose.

[28] I find, on a balance of probabilities, that this marriage is genuine, and that this marriage was not entered into primarily for an immigration purpose. The appeal is allowed.

[edited for clarity, spelling, grammar and syntax]

2018 CanLII 46480 (CA IRB)

NOTICE OF DECISION

The appeal is allowed. The officer's decision to refuse a permanent resident visa is set aside, and the officer must continue to process the application in accordance with the reasons of the Immigration Appeal Division.

Maureen Kirkpatrick
Maureen Kirkpatrick

March 15, 2018
Date

Judicial Review – Under section 72 of the *Immigration and Refugee Protection Act*, you may make an application to the Federal Court for judicial review of this decision, with leave of that Court. You may wish to get advice from counsel as soon as possible, since there are time limits for this application.