IMM-4343-19

2020 FC 906

A.P. (*Applicant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

INDEXED AS: A.P. v. CANADA (CITIZENSHIP AND IMMIGRATION)

Federal Court, Fuhrer J.—Toronto, March 10; Ottawa, September 17, 2020.

Citizenship and Immigration — Status in Canada — Permanent Residents — Conjugal partner sponsorship — Judicial review of Immigration and Refugee Board, Immigration Appeal Division (IAD) decision dismissing appeal from immigration officer's decision refusing applicant's conjugal partner sponsorship application — IAD considering factors enumerated by Supreme Court of Canada in M. v. H., finding, on balance of probabilities, that AM not applicant's conjugal partner — Applicant obtaining refugee protection in Canada based on sexual orientation as gay man — Re-establishing relationship with former female university classmate, AM — Applicant, AM deciding to meet abroad where relationship developing — Child resulting from trip together — Applicant, AM deciding to commit to each other, their child, raise child together as family — Applicant deciding to sponsor AM as conjugal partner, their child to come to Canada — Whether IAD's decision unreasonable, procedurally unfair, in particular whether IAD's decision exhibiting closed mind reliance on stereotypes, subjective treatment of evidence — IAD treating evidence unreasonably, unfairly, resulting in unsustainable conclusion — M. v. H. determining that, after many years together, opposite-sex couple or even same-sex couple could be in conjugal relationship even though having neither children nor sexual relations — This finding applying to mixed-orientation couples too even where neither partner identifying as bisexual as in present case — Fact of couple's different sexual orientation not foreclosing possibility of applicant, AM establishing being in committed relationship of some permanence — IAD unreasonably assessing applicant, AM's relationship before concluding insufficient evidence proving they were in conjugal relationship — IAD focusing unreasonably only on factors which raised concerns; failing to identify, assess positive factors offered in support of applicant's relationship with AM, most notably their personal behaviour — IAD's failure to mention positive evidence on most relevant aspects of its decision rendering it unreasonable — IAD's decision based on closed mind or bias resulting in unreasonable assessment of evidence regarding possibility of mixed-orientation couple meeting criteria for conjugal partnership — IAD's decision rising to level of real or perceived bias — Matter remitted to different IAD member or panel for redetermination — Application allowed.

This was an application for judicial review of a decision of the Immigration and Refugee Board, Immigration Appeal Division dismissing an appeal from an immigration officer's decision refusing the applicant's conjugal partner sponsorship application. [2, 3, 4] The IAD considered the factors enumerated by the Supreme Court of Canada in *M. v. H.* and found, on a balance of probabilities, that AM was not the applicant's conjugal partner.

The applicant obtained refugee protection in Canada based on his sexual orientation as a gay man. He re-established a relationship with a former university classmate and close friend, AM, who

is a woman. The applicant and AM decided to meet up abroad in particular because the applicant could not return to the country from which he fled persecution and in which AM resides. On their trip, there was a shift in their relationship and they had unprotected sex. A child resulted from that trip. The applicant and AM decided to commit to each other and their child and to raise the child together as a family unit. While they considered marrying in a third country, it was not possible to do so. Therefore, they decided that the applicant would sponsor AM as a conjugal partner and their child to come to Canada. It was at that time that the applicant first disclosed his sexual orientation to AM. Despite this disclosure, they proceeded with the sponsorship application. On judicial review, the applicant argued that the IAD's decision was unreasonable and procedurally unfair.

The issues were whether the IAD's decision was unreasonable and procedurally unfair, in particular, whether the IAD's decision exhibited a closed mind reliance on stereotypes and the subjective treatment of the evidence.

Held, the application should be allowed.

The IAD treated the evidence unreasonably and unfairly, resulting in an unsustainable conclusion. The Supreme Court in *M. v. H.* determined that, after many years together, an opposite-sex couple or even same-sex couple could be in a conjugal relationship even though they have neither children nor sexual relations. This applies to mixed-orientation couples too even where neither partner identifies as bisexual as in the case of the applicant and AM. The fact of their different sexual orientations did not foreclose the possibility of the applicant and AM establishing that they are in a committed relationship of some permanence. The IAD unreasonably assessed the applicant and AM's relationship before concluding there was insufficient evidence they were in a conjugal relationship. The most egregious error was the IAD's finding that "a homosexual man and a heterosexual woman are [not] able to meet the sexual component of conjugal partnership". As noted in *M. v. H.*, not all factors are necessary for the relationship to be considered conjugal and they may exist in varying degrees. The IAD did not acknowledge the objective evidence the applicant provided on mixed-orientation couples nor consider the possibility that a loving relationship centred on the concept of a joint family unit, regardless of the degree of sexual intimacy, can meet the criteria for a conjugal relationship. In addition, the IAD's conclusion that the applicant should have disclosed his sexual orientation to AM's parents because he did not know definitely what their reaction would be ignored the applicant's lived experience of being persecuted personally. The IAD focused unreasonably only on those factors which raised concerns and failed to identify and assess positive factors offered in support of the applicant's and AM's relationship, most notably their personal behaviour. The IAD's failure to mention the positive evidence on the most relevant aspects of its decision—namely, their sexual and personal behaviour—rendered its decision unreasonable. As argued by the applicant, the IAD's decision was based on a closed mind or bias resulting in an unreasonable assessment of the evidence regarding the possibility of a mixed-orientation couple meeting the criteria for a conjugal partnership. The applicant also rightly argued that the IAD focused exclusively on what appeared to be pre-determined conclusions on the ability of mixed-orientation couples to engage in sexual relations and form conjugal relationships, contrary to the evidence provided and to the findings in *M. v. H*.

Therefore, the IAD's decision rose to the level of real or perceived bias. Both the reasons and the transcript demonstrated the IAD was not open to the possibility of a loving, mixed-orientation relationship centred on the concept of a joint family unit meeting the statutory criteria, regardless of the degree of sexual intimacy. The matter was thus remitted to a different IAD member or panel for redetermination.

STATUTES AND REGULATIONS CITED

Immigration and Refugee Protection Regulations, SOR/2002-227, ss. 2 "conjugal partner", 4(1),

116, 117(1)(a),(b), 121.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 12(1), 65.

CASES CITED

APPLIED:

M. v. H., [1999] 2 S.C.R. 3, (1999), 43 O.R. (3d) 254; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121; *Sandhu v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 889.

CONSIDERED:

Leroux v. Canada (Citizenship and Immigration), 2007 FC 403, 64 Imm. L.R. (3d) 123; *Gjoka v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 386.

REFERRED TO:

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, (1999), 174 D.L.R. (4th) 193; *Mbollo v. Canada (Citizenship and Immigration)*, 2009 FC 1267; *Molodowich v. Penttinen*, 1980 CanLII 1537, 17 R.F.L. (2d) 376 (Ont. S.C.); *Ivanov v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1055, [2007] 2 F.C.R. 384; *Cepeda-Gutierrez (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, [1998] F.C.J. No. 1425 (QL) (T.D.); *Lubana v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, 228 F.T.R. 43; *Shumilo v. Canada (Citizenship and Immigration)*, 2018 FC 1135; *Enright v. Canada (Citizenship and Immigration)*, 2011 FC 1258, 399 F.T.R. 69.

APPLICATION for judicial review of an Immigration and Refugee Board, Immigration Appeal Division decision (*X (Re)*, 2019 CanLII 141164) dismissing an appeal from an immigration officer's decision refusing the applicant's conjugal partner sponsorship application. Application allowed.

APPEARANCES

Athena Portokalidis for applicant.

Kareena Wilding for respondent.

SOLICITORS OF RECORD

Bellissimo Law Group, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment and judgment rendered in English by

FUHRER J.:

I. Overview

[1] The applicant, AP, obtained protection in Canada based on his sexual orientation: he identifies as a gay man. AP re-established a relationship with a former university classmate and close friend, AM, who is a woman. AP and AM decided to meet up abroad for several reasons: as a refugee claimant, AP could not return to the country from which he fled persecution for being gay and where AM still resides; and AM was refused a visa twice. Until their reunion, they spoke almost every day. On their trip, there was a shift in their relationship and they had unprotected sex after a "night on the town." AP disclosed to AM that he was HIV positive but that there was a low chance of infecting anyone. Although they tried to have sex again on a few other occasions during the trip, AP had difficulty given his sexual orientation.

[2] A child, KP, resulted from that trip. AP and AM decided to commit to each other and their child, and to raise the child together as a family unit. There were two subsequent trips to a third country, one while AM was pregnant and another when KP turned two years old. They communicate regularly by Skype and AP provides AM with financial assistance. They considered marrying in a third country. AP made enquiries in three countries and was advised they could not do so because of AP's permanent resident status (his Canadian citizenship application is pending). Instead, they decided AP would sponsor AM as a conjugal partner, and their child, to come to Canada; at that time, AP first disclosed his sexual orientation to AM. Despite this disclosure, they proceeded with the sponsorship application.

[3] An immigration officer with the Canadian Embassy refused the application without an interview. In short, the officer found that AM was not a conjugal partner of AP, "given the degree of interdependence" between them and hence, the officer was not satisfied that AM is a member of the family class. The officer further held, regarding AP's concurrent H&C application, that there were insufficient humanitarian and compassionate grounds to warrant approval. I note that the refused H&C application is the subject of a separate judicial review application presently in abeyance pending the disposition of the matter before me.

[4] The Immigration Appeal Division dismissed the appeal from the immigration officer's decision [*X (Re)*, 2019 CanLII 141164], following two days of hearing. The IAD considered the factors enumerated in *M. v. H.*, [1999] 2 S.C.R. 3, (1999), 43 O.R. (3d) 254, and found that on a balance of probabilities AM is not AP's conjugal partner. AP now challenges the IAD's decision.

[5] The applicant argues that the IAD's decision was unreasonable and procedurally unfair. Subsumed in the question of procedural fairness is the issue of whether the IAD's decision exhibits a closed mind reliance on stereotypes and the subjective treatment of the evidence.

[6] I agree with the applicant that the IAD treated the evidence unreasonably and unfairly, resulting in an unsustainable conclusion. I therefore grant this application for judicial review, for the reasons that follow.

II. The IAD's Decision

[7] The IAD addressed the factors identified in *M. v. H.* and concluded that, on a balance of probabilities, the officer's decision was valid in law and that AM is not AP's conjugal partner:

(i) **Shared shelter**: This was a neutral factor. The couple did not cohabit except during vacations. The IAD conceded that AP could not return to his country of origin because of his protected person status, but noted that the couple never identified a third country where they could live together.

(ii) **Sexual and personal behaviour**: The IAD acknowledged that AP and AM knew each other when they studied together at university, and that AP considered AM a close friend. Though AP was aware of AM's romantic feelings for him, AP was involved in a same-sex relationship at that time. The IAD was not persuaded, however, that "a homosexual man and a heterosexual woman are able to meet the sexual component of conjugal partnership," and based on the following factors concluded that the sexual and personal behaviour of the couple was inconsistent with a conjugal partnership:

• AM does not know the name of AP's former partner nor how long they were in a relationship;

• AM feigned any interest in AP's relationship history, which the IAD described as unusual in a genuine relationship;

• AM did not know how AP acquired HIV;

• AP did not disclose to AM that he was gay until after the birth of their child;

• Such lack of communication and candor (demonstrated by the above points) is not consistent with a couple engaged in a genuine conjugal relationship;

• That AP would engage in unprotected sex with a partner of either sex with whom he was in a genuine conjugal relationship;

• AP had difficulty being sexually aroused because of his orientation;

• AP does not identify as bisexual.

(iii) **Services**: The IAD found the sharing of services was not a relevant factor because of the lack of cohabitation.

(iv) **Social Activities**: The IAD acknowledged the testimony of AP's brother regarding the relationship between the couple. The IAD also noted that, despite AM's parents knowing AP was the father of their grandchild, they did not know of his sexual orientation. Acknowledging AP's claim for protection was accepted on the basis of his sexual orientation, the IAD nonetheless found [at paragraph 10] there was "no persuasive evidence … on the views of [AM]'s parents and why the couple would not advise them of [AP]'s orientation".

(v) **Economic Support**: The IAD considered this a positive factor, noting AP's evidence of regular financial transfers to AM and KP.

(vi) **The Social Perception of the Two as a Couple:** The IAD considered this a positive factor, noting immediate family members and friends perceived them as a couple.

(vii) **Children**: The IAD found [at paragraph 13] it "clear from the couple's testimony that they both love their child[, and that AP] wants to support [KP] and [the] mother". The IAD also found AP "wants to do right by [AM] and be a father to his child".

III. Relevant Provisions

[8] See Annex A.

IV. Standard of Review

[9] The presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (*Vavilov*), at paragraph 10. It is not a "'rubber-stamping'" exercise, but rather a robust form of review: *Vavilov*, above, at paragraph 13. Courts should intervene only where necessary. To avoid judicial intervention, the decision must bear the hallmarks of reasonableness — justification, transparency and intelligibility —and it must be justified in relation to the factual and legal constraints applicable in the circumstances: *Vavilov*, at paragraph 99. A decision may be unreasonable if the decision maker "fundamentally misapprehended or failed to account for the evidence before it": *Vavilov*, above, at paragraph 126. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, above, at paragraph 100.

[10] Breaches of procedural fairness in administrative contexts have been considered reviewable on a correctness standard or subject to a "reviewing exercise … 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied": *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121, at paragraph 54. The duty of procedural fairness "is 'eminently variable', inherently flexible and context-specific"; it must be determined with reference to all the circumstances, including the *Baker* [*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, (1999), 174 D.L.R. (4th) 193] factors: *Vavilov*, above, at paragraph 77. In sum, the focus of the reviewing court is whether the process was fair.

V. Analysis

[11] The Minister argues that the IAD reasonably determined AM is not AP's conjugal partner: *Mbollo v. Canada (Citizenship and Immigration)*, 2009 FC 1267 (*Mbollo*). With the following principles in mind, I disagree.

[12] *M. v. H.* relies on *Molodowich v. Penttinen*, 1980 CanLII 1537, 17 R.F.L. (2d) 376 (Ont. S.C.) for the generally accepted characteristics of a conjugal relationship, exemplified by the factors enumerated above. These factors may exist in varying degrees and not all are necessary for the relationship to be considered conjugal. Couples are not required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal": *M. v. H.*, above, at paragraph 59.

[13] There was no question in the Court's mind in *M. v. H.* that, after many years together, an opposite-sex couple could be in a conjugal relationship even though they have neither children nor sexual relations. "[T]he weight to be accorded the various elements or factors to be considered in determining whether an opposite-sex couple is in a conjugal relationship will vary widely and almost infinitely": *M. v. H.*, above, at paragraph 60. The Supreme Court further found that this applies to same-sex couples as well, and I have no hesitation finding this applies to mixed-orientation couples too, even where neither partner identifies as bisexual as in the case of AP and AM. "Courts have wisely determined that the approach to determining whether a relationship is conjugal must be flexible[; t]his must be so, for the relationships of all couples will vary widely" (emphasis added): *M. v. H.*, above, at paragraph 60.

[14] The *M. v. H.* factors have been adapted to the immigration context, including the circumstances of partners who live in different countries: *Leroux v. Canada (Citizenship and Immigration)*, 2007 FC 403, 64 Imm. L.R. (3d) 123 (*Leroux*), at paragraph 23. The alleged conjugal relationship nonetheless "must have a sufficient number of features of a marriage to show that it is more than just a means of entering Canada as a member of the family class": *Leroux*, above, at paragraph 23. Parties must demonstrate, for

example, that their conjugal relationship began at least one year prior to submitting a sponsorship application and continued throughout the processing of the application: sections 2, 4, 121 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[15] IAD hearings are *de novo*: *Mbollo*, above, at paragraph 24. The panel must assess and weigh, independently, all relevant evidence before making a final determination. While decision makers are presumed to have considered all evidence prior to rendering a decision and need not respond to every line of inquiry, non-engagement with evidence or submissions central of the applicant's argument may rebut this presumption, rendering the decision unreasonable: *Vavilov*, above, at paragraphs 127–128; *Ivanov v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1055, [2007] 2 F.C.R. 384, at paragraph 23; *Leroux*, above, at paragraph 31, citing *Cepeda-Gutierrez (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, [1998] F.C.J. No. 1425 (QL) (T.D.), at paragraph 17.

[16] I find the fact of their different sexual orientations does not foreclose the possibility of AP and AM establishing that they are in a committed relationship of some permanence. In my view, the IAD unreasonably assessed AP and AM's relationship before concluding there was insufficient evidence they were in a conjugal relationship. The most egregious error was the IAD's finding [at paragraph 8] that "a homosexual man and a heterosexual woman are [not] able to meet the sexual component of conjugal partnership". As noted in *M. v. H.*, not all factors are necessary for the relationship to be considered conjugal and they may exist in varying degrees.

[17] AP provided objective evidence, for example, on the existence of mixed-orientation couples, and testified that despite his sexual orientation, he felt love for and commitment to AM that began when they met up abroad and AM became pregnant. The fact of their different sexual orientations also did not foreclose the development of sexual intimacy over time in their case, notwithstanding initial difficulties. When asked at the hearing whether AP and AM are sexually intimate on their trips, AP answered yes. He explained how his mindset shifted "step by step, from vacation to vacation, from more time spent together, … [to] see that it is possible" notwithstanding his orientation. AP also testified that the problem "technically" can be solved, with sex toys or applications for example, and further explained it is about feelings and whether "you [are] getting all the richness of feelings or being having sex with who you love".

[18] The IAD does not acknowledge this evidence, nor consider the possibility that a loving relationship centred on the concept of a joint family unit, regardless of the degree of sexual intimacy, can meet the criteria for a conjugal relationship. Sexual relations are but one aspect—and not even the predominant consideration—in assessing the existence of a conjugal relationship.

[19] The Minister points to the factual conclusions made by the IAD, as outlined in paragraph 7 above, to suggest the IAD was concerned their friendship did not reach the required level of intimacy, including AP and AM's limited knowledge on discrete topics, such as details of AP's former homosexual relationship, and his delayed disclosure of his sexual orientation, and that they did not inform AM's parents of AP's sexual orientation.

[20] I find this argument unpersuasive for several reasons. While the IAD need not reference every piece of evidence or testimony, in my view the IAD was required to receive and treat reasonably and fairly AP's evidence and explain why his explanations were insufficient to allay concerns. This was not done.

[21] For example, as disclosed in his testimony, AP himself did not know how he became HIV positive, and only could speculate at best it originated from a former partner: Q: "Do you know - do you know how became infected with the HIV virus?"; A: "Probably with some—some of my ex-boyfriends … nobody ever told me that he is positive". It therefore is unfair to expect AM to know information about which AP himself only can speculate. AP and AM also explain they don't really talk about their previous relationship history, and instead choose to focus on their future together. The IAD provided no explanation for why it considered this unusual.

[22] Further, AP's testimony demonstrates his difficulty in expressing his sexuality. In my view, the IAD must consider cultural contexts from a country of origin perspective, and not through "Western eyes": *Gjoka v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 386, at paragraph 81. The IAD also must be alert or sensitive to the challenges individuals with non-heterosexual sexual orientation and gender identities may face in disclosing such information, including reticence in discussing it with loved ones. I find the IAD's decision lacking such sensitivity.

[23] Having reviewed the transcript of his testimony, I further note AP explained several times how he was afraid to disclose his sexual orientation to AM earlier because he was uncomfortable disclosing any information on this topic in general. For example, his brother seems to have discovered AP's orientation by accident, not by intent, when his brother observed AP with another man in the kitchen. AP was unsure of how AM would react to the news, especially when they knew each other at university, and he felt the distance could exacerbate her reaction. AP explains he wanted to discuss this in person, but noted that due to limited funds, vacation restrictions from his job, and that he had to go to the embassy of his country of origin (from which he claimed protection) each time they travelled to give AM permission to travel with KP, he and AM were able to see each other only on limited occasions where there was never an appropriate time to talk. For example:

> **Q:** You learn she is pregnant in January of 2014.

A: Yes.

Q: But you wait another year and three months to tell her, oh, by the way, darling, I am gay. Why ---?

A: I would be – I would be waiting even for more or earlier if I had time to – not to be separated by thousands of miles but to have a seat together, how people do it, and to discuss it, because it's a tricky point and I would like to see her eyes not over Skype and I may be – I man like to take her hand and explain it like face to face because, again, I am not gay activist and ---

…

Q: Well, if you knew that, why couldn't you tell her?

A: But this is my private point. I didn't know, I don't ---

Q: How is it private? You – you are making her pregnant. She knows you are HIV positive. That's – that's high on the privacy scale. So you are making her pregnant, you told her you are HIV positive, you know she is gay friendly you tell me but you can't tell her: "Oh, honey, I am gay"?

A: To some point when I feel myself more convenient, and, um, more – more convenient and confident I would say. Sir, again, this is not the point for me to discuss over Skype or over WhatsApp.

Q: Well, it's, you know, life – life doesn't always present us with the – with the most convenient, um, situations to discuss these things. I am just surprised that you waited as long as you did to tell her and I am – I am thinking that you might never have told her if she hadn't asked. She might not even know today if she hasn't asked.

A: No. And she didn't ask. She didn't ask. ...

[24] In addition, the IAD's conclusion that AP should have disclosed his sexual orientation to AM's parents, because he did not know definitely what their reaction would be, ignores AP's lived experience of being persecuted *personally*, including being physically beaten, for his sexual orientation in his country of origin. I find his testimony demonstrates this: "we never discussed because she is absolutely clear to me, I know her father, I know—I know people in [country of origin] in general let's say. I escaped there because of this common attitude which got to that case forced me to get out. So it's clear for me, absolutely, like as sun rises at morning and falling down as night. So we know it for sure for what the reaction would be."

[25] I also find the IAD's conclusion that it was "perplexing" a conjugal couple would choose to have unprotected sex unreasonable because it imports the IAD's value judgment into the assessment, rather than considers whether two adults who trust each other may consent to such activity: *Lubana v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, 228 F.T.R. 43, at paragraphs 11–12. As well, it is factually

incorrect because AP and AM both testify their conjugal relationship began only after AM disclosed she was pregnant.

[26] The IAD focused unreasonably only on those factors which raised concerns, and failed to identify and assess positive factors offered in support of AP and AM's relationship, most notably their personal behaviour. For example, while the IAD acknowledged both families know of their relationship and consider them a couple, it remained fixated on AM's family not knowing the particulars of their sex life. This Court has found it unreasonable to engage only with evidence supporting the decisionmaker's preferred outcome, rather than considering all evidence and providing a rationale as to why certain evidence is preferred. I find the IAD's failure to mention the positive evidence on the most relevant aspects of its decision—namely, their sexual and personal behaviour—renders its decision unreasonable: *Shumilo v. Canada (Citizenship and Immigration)*, 2018 FC 1135, at paragraphs 45–50; *Enright v. Canada (Citizenship and Immigration)*, 2011 FC 1258, 399 F.T.R. 69, at paragraphs 46–50.

[27] Finally, AP submits, and I agree, the IAD's decision was based on a closed mind or bias resulting in an unreasonable assessment of the evidence regarding the possibility of a mixed-orientation couple meeting the criteria for a conjugal partnership. In AP's view, with which I also agree, the IAD focused exclusively on what appear to be pre-determined conclusions on the ability of mixed-orientation couples to engage in sexual relations and form conjugal relationships, contrary to the evidence provided and to the findings in *M. v. H*. The IAD had a closed mind as to the couple's decision to engage in unprotected sex, despite this factor having no relevance to, or bearing on, their conjugal relationship status. The IAD also had a closed mind as to why AP did not disclose his sexual orientation readily to AM and her parents despite evidence of his prior negative lived experiences in his country of origin from his refugee claim.

[28] Justice Strickland recently described the "'closed mind'" principle in terms of "an unstated assertion of bias": *Sandhu v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 889 (*Sandhu*), at paragraph 61. According to Justice Strickland, the test for a reasonable apprehension of bias is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude? Would [they] think it is more likely than not that the decision-maker whether consciously or unconsciously would not decide fairly? (*Yukon Francophone School Board, Education Area No. 23 v Yukon Territory (Attorney General)*, 2015 SCC 25)": *Sandhu*, above, at paragraph 61. There is a rebuttable presumption that a tribunal member will act fairly and impartially. Suspicion alone of bias is not enough; a real likelihood or probability of bias must be demonstrated (by the person alleging bias) and the threshold for a finding of real or perceived bias is high.

[29] I find that the IAD's decision rises to this level. Both the reasons and the transcript demonstrate the IAD was not open to the possibility of a loving, mixed-orientation relationship centred on the concept of a joint family unit meeting the statutory criteria, regardless of the degree of sexual intimacy.

VI. Conclusion

[30] This judicial review should be granted. The IAD unreasonably narrowed the scope of a conjugal partner to sexually romantic relationships, to the exclusion of other evidence demonstrating a committed relationship of some permanence. Neither party proposed a serious question of general importance for certification and I find that none arises.

JUDGMENT in IMM-4343-19

THIS COURT'S JUDGMENT is that:

1. AP's judicial review application is granted;
2. The Immigration Appeal Division's decision dated June 17, 2019 is set aside;
3. The matter is remitted to a different IAD member or panel for redetermination;
4. There is no serious question of general importance for certification; and
5. There are no costs.

Annex A: Relevant Provisions

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Family reunification

12 (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.

…

Humanitarian and compassionate considerations

65 In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.

Immigration and Refugee Protection Regulations, SOR/2002-227

Interpretation

2 The definitions in this section apply in these Regulations.

…

conjugal partner means, in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year. (*partenaire conjugal*)

…

Bad faith

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

(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or

(b) is not genuine.

…

Family class

116 For the purposes of subsection 12(1) of the Act, the family class is hereby prescribed as a class of persons who may become permanent residents on the basis of the requirements of this Division.

Member

117 (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is

(a) the sponsor's spouse, common-law partner or conjugal partner;

(b) a dependent child of the sponsor;

…

Requirements

121 Subject to subsection 25.1(1), a person who is a member of the family class or a family member of a member of the family class who makes an application under Division 6 of Part 5 must be a family member of the applicant or of the sponsor both at the time the application is made and at the time of the determination of the application.