Federal Court Cour fédérale

Date: 20150317

Docket: IMM-5743-13

Citation: 2015 FC 320

Ottawa, Ontario, March 17, 2015

PRESENT: The Honourable Mr. Justice S. Noël

BETWEEN:

MOHAMAD ALI KHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application by Mohamad Ali Khan [the Applicant] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of the decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board, dated August 13, 2013. The IAD dismissed the appeal of the Applicant against the refusal of the

family class sponsorship application for permanent residence of his wife, Bibi Zulaika-Baksh [Bibi] by a Visa officer.

II. Facts

[2] The Applicant is a 75-year-old Canadian citizen, originally from Guyana. Bibi is 47 years old and was born in Guyana, where she still resides.

[3] The Applicant travelled to Guyana in April 2009. He first spoke to Bibi over the phone on April 27, 2009. They met in person on April 29, 2009. They married in an Islamic ceremony, on May 3, 2009. The Applicant returned to Canada on May 6, 2009.

[4] The Applicant returned to Guyana on October 5, 2009, and remained there until January 15, 2010. The couple was legally married in a civil ceremony on January 2, 2010.

[5] Bibi applied for a Temporary Resident Visa [TRV] in November 2009, which was refused.

[6] The Applicant filed an overseas spousal sponsorship application for Bibi in March 2010. Bibi was interviewed at the High Commission in Port-of-Spain [High Commission] regarding the application. The Applicant was also present. On July 8, 2010, the High Commission refused the sponsorship. The Applicant filed a notice of appeal to the IAD on August 31, 2010. The IAD dismissed the appeal on August 13, 2013. This is the decision under review.

III. Visa Officer's Decision

[7] The Visa officer determined that the marriage between the Applicant and his wife was not genuine and entered into for the purpose of acquiring status or privilege within the meaning of section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations]. In rendering its decision, the Visa officer explained that the parties provided contradictory answers as to how much time they spent together when they first met, their age difference, the money the Applicant sent to his wife before they met, the Applicant's poor memory of his wife's children's names and how many she has, no proof of email correspondence between the two of them and the fact that the Applicant had a motive to leave Guyana as she had witnessed her late husband's murder.

IV. Impugned Decision – Immigration Appeal Division Decision

[8] The IAD first stated that it would apply the disjunctive test of subsection 4(1) of the Regulations, as amended on September 30, 2010 (SOR/2010-208) in its de novo appeal of the Visa officer's decision.

[9] The IAD first pointed out several inconsistencies on important issues between the parties and between the sponsored spouse/partner questionnaire and the sponsor questionnaire [the forms] and the Computer Assisted Immigration Processing System [CAIPS] notes which would not be encountered in a genuine relationship. The Applicant and his wife gave contradictory information as to when and where the two of them cohabitated before and after their marriage of May 3, 2009. There were also inconsistencies regarding who filled out the forms. The IAD also

pointed out inconsistencies between the information provided by the Applicant and his wife with regards to when they met each other's family and the information given by the wife to obtain a Temporary Resident Visa to Canada and a respective explanation given by each of them.

[10] The IAD therefore found, on a balance of probabilities that the marriage was not genuine and was entered into for the purpose of acquiring status or privilege within the meaning of section 4 of IRPA.

V. Parties' Submissions

[11] The Applicant submits that the IAD misapprehended the evidence of cohabitation between the Applicant and Bibi. He argues that the IAD was wrong when it said that during the Applicant's testimony, he contradicted Bibi about where he stayed between October 2009 and January 2010, when the transcript of the hearing shows no contradiction. Counsel submits that this error is determinative of the decision made and that it should be quashed on that basis. The Applicant also argues that this Court should not try to rewrite new reasons based on the record as for why the appeal was refused. The Respondent replies that the IAD relied, in its analysis, on the inconsistent earlier evidence provided by the Applicant and Bibi. The Respondent thus argues that the IAD decision is reasonable.

VI. Issue

[12] I have reviewed the parties' submissions and respective records and state the issue as follow:

1. Did the IAD err in concluding that Bibi falls within the class of persons described in subsection 4(1) of the Regulations?

VII. Standard of Review

[13] Both parties agree that the standard of review applicable to the judicial review of this matter is that of reasonableness. Indeed, the question of whether the IAD erred in concluding that Bibi falls within the class of persons described in subsection 4(1) of the Regulations is a highly factual determination (*Huynh v Canada (Minister of Citizenship and Immigration)*, 2013 FC 748 at para 6 [*Huynh*]; *Zheng v Canada (Minister of Citizenship and Immigration)*, 2011 FC 432 at para 18 [*Zheng*]; *Kaur v Canada (Minister of Citizenship and Immigration)*, 2010 FC 417 at para 14 [*Kaur*]; *Mendoza Perez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1 at para 22 [*Mendoza*]). The Court shall only intervene if it concludes that the decision is unreasonable, and falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 at para 47).

VIII. Analysis

[14] I will begin by addressing the Applicant's argument that this Court "should not entertain invitation to try to fashion new reasons based on the record for why the appeal could have been refused" (AR page 322 at para 55). In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, the Supreme Court of Canada explained that "the reasons must be read together with the outcome and serve

the purpose of showing whether the results falls within a range of possible outcomes" (para 14). This Court addressed this principle in *Pathmanathan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 353. The Supreme Court also stated in *Alberta Teachers' Association*, above that:

> [54] […] [c]ourts should not give due regard to the reasons provided by a tribunal when such reasons are available. The direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" (*Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135 at paras. 53 and 56).

[15] As will be seen in the analysis below, this Court will refer the IAD reasons to assess whether to dismiss or allow the judicial review and will refer to the record when necessary. Although I acknowledge that the IAD could have provided more details in certain instances, I disagree with the Applicant's contention that the reasons as written by the IAD are inadequate. A reading of the decision demonstrates that the IAD considered the record as it was presented in rendering its decision and properly listed and explained why it dismissed the appeal.

A. *Did the IAD err in concluding that Bibi falls within the class of persons described in subsection 4(1) of the Regulations?*

[16] Subsection 12(1) of IRPA explains that a foreign national may be selected as a member of the family class on the basis of their relationship as the spouse of a Canadian citizen or permanent resident. Subsection 117(1) of the Regulations defines who is a member of the family class. Subsection 4(1) of the Regulations however highlights the conditions under which a

foreign national will not be considered a spouse. To make a determination under subsection 4(1) of the Regulations, the IAD must determine whether the marriage was either entered into primarily for acquiring status or privilege under IRPA, or is not genuine (*Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1077 at para 5 [*Singh*]). Either finding precludes the spouse from obtaining the necessary visa to live with her husband in Canada (*Ibid*). The onus is on the Applicant to demonstrate that the marriage is genuine and was not entered into primarily to facilitate his wife's immigration to Canada.

[17] In the case at bar, the IAD first addressed the inconsistencies as to the issue of cohabitation between the Applicant and Bibi. The IAD determination on this point is reasonable. There are numerous contradictions on this issue, in the various documentation presented before the IAD and in the affidavit presented in support of this judicial review:

1. The Applicant's own affidavit sworn and signed on October 2, 2013 in support of his application for leave and judicial review [affidavit] states that he and Bibi married on May 3, 2009, consummated the marriage that same night and remained together until May 6, 2009, until he returned to Canada (Applicant's Record [AR] page 13 at paras 6-7). The Applicant is saying here that they cohabited between May 3, 2009 and May 6, 2009. In this same affidavit, the Applicant also explained that he stayed with Bibi after the civil ceremony of January 2, 2010, until he returned to Canada on January 15, 2010 (AR page 14 at para 10).

2. During the interview with the Visa officer at the High Commission with regards to the sponsorship application, the Applicant stated that he stayed with Bibi after the civil

ceremony of January 2, 2010 for one or two weeks (AR page 43). The Applicant also stated that he was in his wife's presence only a few times before his lawful marriage on January 2, 2010 and stated that he stayed with his sister most of the time before the civil marriage (AR page 43).

3. The Applicant contradicted this information at the hearing of June 7, 2013, where the Applicant said that he stayed with Bibi when he went back to Guyana in October 2009 (Certified Tribunal Record [CTR] page 356 at line 25). When questioned by the Minister's counsel, as to why the sponsorship questionnaire said that he and Bibi only cohabitated together after January 2, 2010, the Applicant explained that this was an error. He again specified that he stayed with her from October 2009 until January 15, 2010 (CTR page 358 at line 10).

4. The Applicant also stated, at the October 24, 2012, hearing that he stayed with Bibi between May 3, 2009 and May 6, 2009 (CTR page 490 at line 40). He also stated that he stayed with Bibi when he travelled back to Guyana in October 2009 until January 15, 2010 (CTR page 491 at line 25).

5. During the interview with the Visa officer at the High Commission, Bibi stated that the Applicant stayed with her from October 15, 2009 and stayed with her for six weeks (AR page 43).

6. In the sponsored spouse/partner questionnaire, Bibi wrote "[F]rom 29 April 2009 to 6 May 2009 and from 5 October, 2009 to 15 January 2010 my sponsor visited twice but before marriage we cannot live together so after marriage we lived together from 2 of

January 2010 to 15 of January 2010. Before marriage, we spent lot of time together" (AR page 50).

[18] The Applicant submits that he did not, at no time during his testimony before the IAD, contradicted his wife about where he stayed between October 2009 and January 2010, contrary to what is written in paragraph 19 of the IAD's reasons. The Applicant argues that such an erroneous finding is critical in that it is such that it is a determinative finding which caused for the conclusion arrived at by the IAD. The confusion arises from the impression given by the use of the words "in his testimony" in paragraph 19. Was the IAD referring to the Applicant's testimony before the IAD or was it referring to the answers given by him to the Visa officer? The answer is found in the footnote used by the IAD. As it is indicated by the footnote of paragraph 19, the IAD was relying on the CAIPS notes of the Visa officer. Therefore, the words "in his testimony" refer to the answers given to the Visa officer and not to the testimony given by the Applicant before the IAD. No critical error was committed by the IAD on this matter. A choice of a better vocabulary such as "in his interview" would have been more useful.

[19] Based on all the contradictory evidence listed above and discussed in the IAD decision (AR pages 9-10 at paras 16-19), it was reasonable for the IAD to find that the marriage was not genuine and entered into primarily for the purpose of acquiring any status or privilege under IRPA.

[20] The IAD also addressed Bibi's TRV application (AR page 10 at para 22), which she applied for in November 2009, approximately six months after her and the Applicant's Islamic

ceremony and while the Applicant was in Guyana. The IAD pointed out that Bibi had written down her marital status as widowed and that she was coming to Canada to visit her cousin, Joey. When the Applicant himself was questioned on this before the IAD at the June 7, 2013 hearing, (CTR pages 364-366), he admitted to having lied in his affidavit submitted in support of his appeal (CTR page 313 at para 4), in which he stated that Bibi had omitted that they were married because she did not want to jeopardise the future sponsorship application. He admitted he had not told the truth and stated he did not know she had applied for a TRV (CTR page 364 at line 45). He wrote in his affidavit in support of this judicial review that he did not know that she had applied for a TRV (AR page 14 at para 9). He also testified at the hearing that Bibi does not know anyone in Canada named Joey, but that he knows a contractor named Joey (CTR pages 367-373 at lines 25 and following). The Applicant gave similar answers when questioned on this issue at the October 24, 2012, hearing (CTR pages 463-465 at lines 15 and following). When Bibi was questioned before the IAD at the June 7, 2013, hearing, she stated that she wanted a visa to come to Canada to surprise her husband and she specified that Joey is a "far distant cousin, a third cousin". She also added that the Applicant did not know of her TRV application (CTR pages 393-395 at lines 35 and following). Later at this hearing, however, Bibi stated she had in fact told her husband about the TRV application after she had applied for it (CTR pages 401-402 at lines 20 and following). Based on the contradictory information the Applicant and Bibi provided, it was reasonable for the IAD to dismiss the appeal.

[21] The IAD further mentioned that there were discrepancies as to when the Applicant and Bibi met each other's family (AR page 10 at para 22). Indeed, the Applicant stated at the June 7, 2013, hearing that Bibi met his family for the first time in April 2009 (CTR page 358 at line 15).

He however specified in his sponsor questionnaire that she met his family in October 2009 (AR page 54). In his affidavit, the Applicant states that there were members on both sides of his and Bibi's family at the Islamic ceremony of May 3, 2009 (AR page 13 at para 6). It was again reasonable for the IAD to take this inconsistency into account in its decision to dismiss the appeal.

[22] The Applicant finally submits that it was unreasonable for the IAD to dismiss the appeal when it wrote in its decision that "[A]lthough a number of the Chavez factors appear to have been satisfied, the panel [the IAD] finds that any such compliance is overwhelmed by the inconsistencies and credibility problems in this appeal" (AR page 8 at para 15). This argument does not hold. The IAD decision highlighted serious inconsistencies that clearly affected the credibility of both the Applicant and Bibi. The Chavez factors discussed in *Chavez v Canada (Minister of Citizenship and Immigration)*, [2005] IADD No 353, No TA3-24409 at paragraph 3, are only proposed factors that can be used to assess the genuineness of a marriage. In the case at bar, the IAD stated to have balanced these factors in its analysis and concluded that the inconsistencies highlighted above outweighed the factors that appeared to be satisfied. This IAD conclusion on this point in reasonable.

[23] Based on all of the above, the decision is reasonable. The IAD highlighted significant inconsistencies that negatively affected the credibility of the Applicant and of his wife, Bibi.

IX. Conclusion

[24] The decision of the IAD is reasonable. It properly concluded that the Applicant has not met his onus of proof that, on a balance of probabilities, his relationship with Bibi is not caught by subsection 4(1) of the Regulations. The intervention of this Court is not warranted.

[25] The parties were invited to suggest a question for certification but none were proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance will be certified.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5743-13
STYLE OF CAUSE:	MOHAMAD ALI KHAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 11, 2015
JUDGMENT AND REASONS:	NOËL S J.
DATED:	MARCH 17, 2015

APPEARANCES:

Anthony Navaneelan	FOR THE APPLICANT
Leanne Briscoe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mamann, Sandaluk and Kingwell, LLP | MIGRATION LAW CHAMBERS Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT