Cour fédérale Federal Court

Date: 20160225

Docket: IMM-3524-15

Citation: 2016 FC 244

Ottawa, Ontario, February 25, 2016

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

LILIBETH PABICO BERCASIO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] of a decision dated July 14, 2015 by a member of the Immigration Appeal Division of the Immigration and Refugee Board [the Board or Member]. The Member dismissed the Applicant's appeal from a Citizenship and Immigration Canada visa officer's decision refusing to grant the Applicant's spouse, Mr. Escorcia, permanent residence through the spousal class sponsorship application process. The

Applicant is seeking to have the decision set aside and referred back for redetermination by a different visa officer.

[2] For the reasons that follow, the application is dismissed.

I. Background

[3] The Applicant is a Canadian citizen who came to Canada as a dependent child from the Philippines in 1977. She has been married three times and has two adult children. Her first marriage was from 1993 to 1996 and her second from 1997 to 2003. She has been married to Mr. Escorcia, the sponsored spouse, since 2011.

[4] Mr. Escorcia is a citizen of Colombia, where he currently resides. He has never been previously married and has no children.

[5] The Applicant first spoke to Mr. Escorcia in February 2008, when telephoning her boyfriend, Eric. Mr. Escorcia was a teacher in Eric's school. The Applicant alleged that she would speak with Mr. Escorcia regularly when telephoning Eric. Through those conversations, she became attracted to Mr. Escorcia. After she broke up with Eric in 2009, she eventually asked him to provide her Mr. Escorcia's phone number. She initiated contact with Mr. Escorcia for the first time over three years later by telephone in May 2011.

[6] A month later, on June 15, 2011, either the Applicant or Mr. Escorcia proposed to the other person via telephone. According to the Applicant, she travelled to Colombia on October 14, 2011 to meet Mr. Escorcia for the first time with the intention of deciding whether to accept his marriage proposal. Two weeks later the couple married on October 28, 2011. The Applicant returned to Canada on the day of her wedding. She returned to Colombia in December 2011 for the honeymoon.

[7] On February 21, 2012, Mr. Escorcia sent in his permanent residence application as a member of the family class, sponsored by the Applicant.

[8] The Applicant traveled again to Colombia in February 2012, April 2012 and August 2012. The Applicant and Mr. Escorcia also took trips to Argentina in August 2012 and to Mexico in December 2012.

[9] On March 1, 2013, the Applicant was sent a notice that the sponsorship application was refused due to a finding that the marriage was entered into for the purpose of acquiring status. On March 6, 2013, the Applicant appealed the sponsorship application refusal to the Immigration Appeal Division.

[10] The couple traveled together to Cuba in May 2013 and September 2013, to Jamaica in March 2014, and to the Bahamas in September 2014. She also returned to Colombia in February 2015.

[11] The appeal was heard in two hearings on March 24, 2015 and June 1, 2015. The Board rejected the appeal on July 14, 2015. This is the decision being judicially reviewed.

II. Impugned Decision

[12] The Board dismissed the Applicant's appeal, finding that both the Applicant and Mr. Escorcia's explanations lacked credibility and reasonableness, and contained serious and fundamental inconsistencies and contradictions. Their failure to explain these discrepancies, contradictions and concerns led the Board to conclude that the marriage was not genuine and therefore entered into primarily for the purpose of acquiring a status or privilege under the Act.

[13] The Board noted inconsistencies between the spouses' testimonies regarding the frequency of contact surrounding their first meet over the telephone and found that it was implausible that the Applicant, if interested in Mr. Escorcia, would have waited three years to initiate contact with him again. Thus, the lack of evidence surrounding their first meeting in 2008, in addition to the implausibility of the genesis of the relationship in 2011, undermined the believability of the Applicant's story.

[14] The Board went on to make other findings that undermined the credibility and reliability of the testimony as a whole, including the failure to accurately recall who initiated the marriage proposal; the inability to explain the haste of the wedding and the failure to inform family members; the lack of family contact even years after the wedding; the lack of knowledge of one

another including the nature of the Applicant's relationship with her children; the lack of knowledge of one another's physical features and friendships; the inability to consistently articulate any future plans; and Mr. Escorcia's immigration history.

III. Legislative Framework

[15] The following provision of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations] is applicable in these proceedings:

4 (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership	4 (1) Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :
(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or	a) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;
(b) is not genuine.	b) n'est pas authentique.

IV. Issues

[16] I find that the following issues arise in this application:

1. Did the Member err by assessing the genuineness of the marriage by stating that the temporal element of the test under the Regulations is at the time of

entering into the marriage, and by according more weight to the initial period of the relationship rather than that following the marriage?

2. Did the Member err in making unsupportable plausibility findings?

3. Did the Member err in considering the immigration history of the sponsored spouse?

V. Standard of Review

[17] The determination of whether a marriage is genuine is a question of mixed fact and law, which attracts a reasonableness standard of review: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Gill v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1522 at paras 17-18 [*Gill*].

VI. Analysis

A. *Did the Member err by assessing the genuineness of the marriage by stating that the temporal element of the test under the Regulations is at the time of entering into the marriage, and by according more weight to the initial period of the relationship rather than that following the marriage?*

[18] The Applicant submits that it was unreasonable for the Member to focus on the couple's activities at the time of the marriage rather than focusing on the events that have occurred since

then. The Applicant relies on *Yadav v Canada (Minister of Citizenship and Immigration)*, 2010 FC 140 at para 59 [*Yadav*] to support her position that the relevant time frame for assessing the genuineness of the marriage is at the time of the assessment interview and not at the time of the marriage. It reads as follows:

> [59] The Court questions whether the immigration officer properly considered whether the marriage was genuine at the time of the interview on May 23, 2008, as opposed to the time the marriage was entered into in 2005. The couple now have a baby, have lived together for three years, have a business together, own a home together, have a mortgage together, have a credit card together and have bank accounts and utility accounts together. While the couple may have a lengthy history with immigration and while the husband may have been unfaithful, these factors do not necessarily affect the genuineness of the marriage at the time of the interview.
>
> [Emphasis added]

[19] As I understand *Yadav*, it stands for the proposition that the relevant time frame for assessing the genuineness of a marriage is at the time of the interview. But this only means that all relevant evidence available at that time should normally be considered. The case does not stand for the proposition that the evidence after the marriage should have more weight than evidence before the marriage, or that the initial evidence of the relationship and marriage cannot outweigh that following the marriage.

[20] The Board based its decision on the evidence concerning the first meeting of the spouses, the commencement of the relationship, the proposal of the marriage, the wedding, the degree of family contact, the extent of the spouses' knowledge of one another, the spouses' future plans, and the immigration history of the sponsored spouse, as well as the time spent together and

communications after the marriage. I agree with the Respondent that the main concentration of evidence undermining the genuineness of the marriage was in the period before and leading up to the marriage.

[21] However, that does not constitute a reviewable error. The question is always where to give weight to evidence of the marriage's genuineness. I think more often than not it is that occurring before and at the time of entering into the marriage, as opposed to the post-marriage activity for a number of reasons. In the first place, the legislation directs the Member to concentrate on this point in time in determining the good faith of the marriage.

[22] Chief Justice Crampton explains this point in the recent *Gill* decision, where he discusses the results of changes in the wording of the Regulations, stating as follows:

> [32] I acknowledge that evidence about matters that occurred subsequent to a marriage can be relevant to a consideration of whether the marriage was entered into primarily for the purpose of acquiring any status or privilege under the IRPA. However, such evidence is not necessarily determinative, and it is not necessarily unreasonable for the IAD to fail to explicitly consider and discuss such evidence.
>
> [33] This is because, in contrast to the present tense focus of the first of the two tests set forth in section 4 of the Regulations, which requires an assessment of whether the impugned marriage "is not genuine," the focus of the second of those tests requires an assessment of whether the marriage "was entered into primarily for the purpose of acquiring any status or privilege under the Act." Accordingly, in assessing whether the latter test is satisfied, the focus must be upon the intentions of both parties to the marriage at the time of the marriage.
>
> [Emphasis added]

[23] In support of the Chief Justice's conclusions, I point out that assessing the genuineness of a marriage is a challenging task at the best of times. Persons who are intent on committing a form of deceit to gain the highly valuable status of Canadian permanent residence will conduct themselves to make the relationship look outwardly genuine, when it is not. Accordingly, the decision-maker who is assessing the reliability of the evidence should have an eye to distinguish between evidence which can be manipulated or devised to outwardly demonstrate genuineness, as opposed to that which has real time spontaneity to it. I think it a fair proposition that the evidence on how a relationship was initiated, develops, and finally matures into a marriage is less subject to manipulation for an improper purpose than post-marriage evidence. It would normally be given significant weight if not suggesting a valid foundation for the marriage that would require strong post-marriage evidence to overcome.

[24] In a general sense that is what occurred here, where the genesis of the relationship and rapid marriage was found to be without much reasonable foundation, including significant credibility issues regarding how it came about. Of lesser weight was the evidence of the lack of family relationship knowledge and other factors. The Member found that in weighing the evidence together, the post-marriage evidence – of Skype and email communications, plus visits and travels together, with some money being sent to Mr. Escorcia – could not demonstrate that the marriage was genuine.

[25] Given the standard of deference that applies to assessing this decision, the Court does not find any reviewable error in the Member concentrating on the initial period of the relationship in

terms of the weight accorded to it, or otherwise find that the Member's decision falls outside the range of reasonable outcomes.

B. *Did the Member err in making unsupportable plausibility findings?*

[26] The Applicant further argues that the Member improperly impugned the Applicant's testimony on the basis of plausibility findings where there was no clear evidentiary basis for doing so. In this regard he cited a number of cases for the proposition that plausibility findings are dangerous and should only be made in the clearest of cases upon a reliable and verifiable evidentiary basis: *Jung v Canada (Minister of Citizenship and Immigration)*, 2014 FC 275 at para 74; *Pulido v Canada (Minister of Citizenship and Immigration)*, 2007 FC 209 at para 37; *Gjelaj v Canada (Minister of Citizenship and Immigration)*, 2010 FC 37 at para 3.

[27] I am in agreement with the Respondent that the Member's statements regarding plausibility are well supported in the reasons. I also agree that what are described as plausibility findings are intertwined with numerous adverse credibility conclusions that remove any concern about the plausibility findings not being reasonable.

[28] These would include inconsistencies about how often the spouses initially spoke in 2008; the three year delay before the Applicant contacted Mr. Escorcia; the Applicant's need to obtain a phone number when she previously testified that she had Mr. Escorcia's number; which spouse proposed to the other, in any event over the telephone and before having met personally; the fact the relationship progressed swiftly within six weeks and the marriage occurring within two

weeks of the Applicant first meeting Mr. Escorcia; only one family member of either family attending the wedding; and the Applicant returning to Canada the same day as the wedding.

[29] Although it is unnecessary for the determination of this matter, I repeat my view expressed in *(K)K v Canada (Minister of Citizenship and Immigration)*, 2014 FC 78 that negative plausibility findings, be they related to credibility or otherwise, are essentially the decision-maker's rejection of an alleged inferential fact by a party required to be made on a simple balance of probabilities. When such finding is under review by the Court, it is subject to the same deference owed to any factual finding by an administrative tribunal. In other words, I respectfully disagree with the statements cited by the Applicant that plausibility findings are dangerous and should only be made in the clearest of cases, although obviously they require a reliable and verifiable evidentiary basis, not losing track however, as to who bears the onus on the underlying fact said to be implausible.

[30] An inference is a deduction of fact which may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. The process of inference drawing involves inductive reasoning which derives new conclusions or facts from primary facts based on the uniformity of prior human experience. If the premises or primary facts are accepted, in order for there to be an inductive conclusion or fact, it must follow with some degree of probability, nothing more. The conclusion is not inherent in the offered evidence or premise, but is a new fact that flows from an interpretation of that evidence.

[31] In this matter, the Applicant and Mr. Escorcia were required to demonstrate that they had a genuine intention to enter into a marriage. Intentions can only be determined by the conduct of the parties, as no invention yet exists to read minds. Therefore, in this case the spouses' genuine intention had to be inferred from the primary facts that would support it as a reasonable probability based on prior human experience. Some of the primary facts available in this matter that could support an inferred fact of a genuine intention to marry were as follows:

- the Applicant's interest in Mr. Escorcia initiated from conversations with him when the Applicant was phoning to speak to her former boyfriend;

- There was no follow up for more than three years after 2008, allegedly because the Applicant did not want to anger her ex-boyfriend, with whom she is on good terms and apparently needed to obtain Mr. Escorcia's phone number from him, although she did not need it previously;

- Based on a series of phone calls, the Applicant and Mr. Escorcia moved forward quickly, with the marriage proposal being made by one of them within the month, without their ever having met each other in person, and they married shortly thereafter.

[32] On the basis of the spouses' conduct, in addition to inconsistencies in their testimony, the Member concluded that a number of their statements were not plausible or believable. For example, the Member made the following finding: "[g]iven their relatively little contact three

years prior, the story, on a balance of probabilities, is not plausible." In my view, this is a proper statement of the standard applicable to the plausibility finding.

[33] Using terms such as a "story" or "conclusion" to describe a lack of plausibility is a common way to express the rejection of an alleged inferential fact, in this case that of genuineness intention in the marriage. The Member could have said that based upon the spouses' conduct described above and inconsistencies in their testimony, he found as a fact that they did not exhibit a genuine intent to proceed to the marriage. In other words, the primary facts of their conduct and common human experience do not support the alleged inferred fact that their intention was genuine. Expressed in this manner, it is clear that the underlying premise of the rejection on grounds of plausibility, including adverse credibility conclusions that could follow, are based upon the spouses' failure to prove the inferred fact of their genuine intention to marry. It is the spouses' onus to establish the genuineness of their marriage as a fact. The Member may conclude that the evidence did not establish the fact on the usual balance of probabilities. Furthermore, rejection of the inferential fact on grounds of implausibility (the inferred fact not been established) must be owed deference in accordance with ordinary review principles of administrative tribunals, and of course section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7.

C. *Did the Member err in considering the immigration history of the sponsored spouse?*

[34] The Applicant also argues that the Member erred by relying on Mr. Escorcia's immigration history as a factor in deciding whether the marriage was entered into in good faith.

The Applicant cites *Tamber v Canada (Minister of Citizenship and Immigration)*, 2008 FC 951 at para 19 [*Tamber*], where the Court stated as follows:

> Furthermore, the Board's observation that Mr. Singh was highly motivated to immigrate to Canada is self evident. Most individuals seeking to come to Canada are highly motivated to do so. This says little about whether a particular marital relationship is genuine.

[35] In that case, the Board relied on the fact that the spouse had previously been rejected as a refugee in Canada as the principal reason to conclude the marriage was not genuine. In addition, there was significant post-marriage evidence showing, for example, that the couple had lived together and had a child, which supported a conclusion that the marriage was genuine.

[36] Each case must be considered on its facts. I do not believe that the Court in *Tamber* intended to make a statement that in no circumstances could the previous immigration history of the foreign national spouse being sponsored not be relevant. The *ratio* I take from the case is that previous immigration history should not be determinative, at least not when there is only one failed refugee application and little other evidence to support a finding that the marriage was not genuine.

[37] In this matter, I agree with the Member that the immigration history of a foreign national is a relevant, but not a determinative factor in assessing whether the marriage was entered into in good faith. I say this because I think the foreign national's motivation to enter into the marriage tends to be the key fact of concern in these cases from the perspective of the object of section 4

of the Regulations. There are generally no immigration issues with respect to the sponsoring permanent resident or Canadian citizen spouse in a bad faith marriage. Conversely, whether the marriage lasts or not, the foreign national will retain the advantage of obtaining Canadian permanent residency if granted the status as a sponsored spouse. For this reason therefore, I am of the view that any evidence that goes to the intention or motivation of the foreign national must be carefully assessed and considered, and this can include the foreign national's immigration record.

[38] What weight to be accorded this evidence is, of course, another matter. Clearly too much weight was given to the factor in *Tamber*. In this matter however, I find no error in the Member considering the evidence of Mr. Escorcia's immigration history and relying upon it as another factor weighing against the conclusion that the marriage was not genuine.

[39] The Member found Mr. Escorcia's desire to come to Canada germane given that he had moved to Canada on two occasions and attempted to remain through a refugee claim on the second occasion. The Member considered it also noteworthy that no evidence was adduced that Mr. Escorcia left Canada for any other reason than to be with his terminally-ill mother, abandoning his refugee claim because the alleged perceived risk no longer existed.

VII. Conclusion

[40] In accordance with the reasons outlined above, I find no reviewable errors as advanced by the Applicant. Otherwise, the Board's decision falls within the range of reasonable outcomes and is justified by intelligible and transparent reasons defensible in respect of the facts and law.

[41] The application is dismissed. No questions were proposed for certification and none are certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed and no question is certified for appeal.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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