Federal Court  Cour fédérale

Date: 20160323

Docket: IMM-2401-15

Citation: 2016 FC 345

Ottawa, Ontario, March 23, 2016

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

AIMEE HELENA BURTON AND KAHARY MATU GRIFFITH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Overview

[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 *Act*] of a decision of the Immigration Appeal Division (IAD), dated May 5, 2015. The IAD refused the Applicants' spousal

sponsorship application on the ground that the marriage had been entered into primarily for the purpose of acquiring a status or privilege under the *Act*.

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

II. Background

[3] The Applicant, Kahary Griffith, came to Canada in 2000 and submitted a refugee claim. His refugee claim was denied and a departure order was issued in 2001. In April 2003, Mr. Griffith met the Applicant, Aimee Burton, at a bus stop. They began dating and were married in October 2003. Mr. Griffith informed Ms. Burton of his immigration status prior to the marriage.

[4] Despite being married, Ms. Burton did not reside with her husband. She continued to reside at her parents' home and did not disclose her marriage. Mr. Griffith never met Ms. Burton's parents or siblings. At the time of the IAD hearing, Ms. Burton's parents were still unaware that she was married.

[5] Mr. Griffith was removed to Saint Vincent and the Grenadines (SVG) on March 28, 2007. Ms. Burton then sought to sponsor Mr. Griffith as a member of the family class and filed a sponsorship application on November 17, 2009.

III. Decision under review

[6] On August 4, 2011, the Canadian High Commission in Trinidad and Tobago issued a refusal letter of the sponsorship application on two grounds: first, because the Applicants' marriage was not genuine and had been entered into primarily for immigration purposes; and

second, because Mr. Griffith was inadmissible under paragraph 36(1)(a) of the *IRPA* as he had been convicted of a controlled substance offence in SVG.

[7] On appeal, the IAD found, on a balance of probabilities, that immigration was the primary purpose of the marriage. The IAD found Ms. Burton to be a credible witness. She testified that at the time of her marriage to Mr. Griffith she did not feel ready or mature enough to move out of her parents' residence. She was also not prepared to risk her relationship with her parents over the marriage, as they would disapprove of Mr. Griffith because of his ethnicity. Ms. Burton testified that she and Mr. Griffith got married to stay together in Canada.

[8] The IAD considered which version of subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the *Regulations*) applied. The IAD relied upon this Court's decision in *Gill v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1522 [*Gill*] to conclude the proper version for consideration was that which was in force at the time of the appeal.

[9] The finding that the marriage was entered into primarily for the purpose of acquiring a status or privilege under the *Act* was sufficient to dispose of the appeal. The IAD declined to rule on the genuineness of the marriage or on Mr. Griffith's apparent criminal inadmissibility.

IV. Issues

[10] On this judicial review, the Applicants submit the IAD erred by applying the new version of the *Regulations* and by misinterpreting the evidence of Ms. Burton.

[11] The Respondent argues that the IAD did not err in its analysis of the marriage and submits the law is settled on the issue of which version of the *Regulations* should apply.

[12] Essentially, this application for judicial review raises the following issues:

1. What is the applicable version of the *Regulations*?

2. Did the IAD err in assessing the Applicants' marriage?

V. Analysis

A. *Standard of review*

[13] This Court has held that decisions of the IAD, as an expert tribunal, are to be assessed on the reasonableness standard and owed deference: *MacDonald v Canada (Minister of Citizenship and Immigration)*, 2012 FC 978 at para 16 [*MacDonald*]; *Dalumay v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1179 at para 19 [*Dalumay*]; *Kaur Barm v Canada (Minister of Citizenship and Immigration)*, 2008 FC 893 at paras 11-12.

[14] The review of the IAD's determination of which version of the *Regulations* applies to the facts of this case is reviewable on a correctness standard: *Gill* at para 18.

[15] Whether a marriage is entered into for the primary purpose of immigration is a question of mixed fact and law, subject to review on a reasonableness standard: *Gill* at para 17; *Sandhu v Canada* (Citizenship & Immigration), 2014 FC 834 at para 8; *Akter v Canada (Minister of Citizenship and Immigration)*, 2015 FC 974 at para 20; *Aburime v Canada (Minister of Citizenship and Immigration)*, 2015 FC 194 at para 19.

B. *Applicable regulation*

[16] The primary issue before the IAD was whether to apply the version of subsection 4(1) of the *Regulations* in force at the time of application (November 2009) or the version in force at the

time of consideration. The applicable provisions of the *Regulations* changed in September 2010. The IAD found the visa officer did not err in applying the version of subsection 4(1) in force at the time of its decision (August 2011), and in addition, the IAD considered the matter *de novo* and applied the version in force at the time of the appeal (May 2015).

[17] The current wording of subsection 4(1) of the *Regulations*, which the IAD applied, provides the following:

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.

[18] The wording in this subsection changed in September 2010 with the word "or" being added between (a) and (b) in place of the word "and". The previous version of section 4 read as follows:

4. For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into	**4**. Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait, le partenaire conjugal ou l'enfant adoptif d'une personne si le mariage, la relation des conjoints de fait ou des partenaires conjugaux ou l'adoption n'est pas

primarily for the purpose of acquiring any status or privilege under the Act.	authentique et vise principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi.

[19] Counsel for the Applicants submit this change is substantive rather than procedural and thus the presumption against retrospective application of legislation applies. This according to the Applicants means that the sponsorship application should be considered pursuant to the wording in place at the time the sponsorship application was filed in 2009. They argue the marriage between the Applicants is genuine and therefore it is irrelevant if it was entered into for the purpose of immigration.

[20] The presumption that "statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act" was articulated in *Gustavson Drilling (1964) Ltd v Minister of National Revenue*, [1977] 1 SCR 271 at 279 [*Gustavson Drilling*]. Essentially this means that a change in legislation is presumed, in the absence of legislative intent to the contrary, not to interfere with rights that have vested or accrued: *Gustavson Drilling* at 282; *R v Dineley*, 2012 SCC 58 at para 10. Accordingly, the real question is if by the act of filing an application to sponsor a spouse, the Applicants acquired rights which attract the presumption. If so, the argument goes, their application should be assessed under section 4 as it was at the time of filing the application in 2009.

[21] This requires a consideration of what, if any, "rights" accrued to the Applicants on the filing of a spousal sponsorship application and whether those rights are substantive or procedural in nature. This is relevant since the presumption against interference with rights will only apply

to rights that are substantive and does not operate in favor of procedural rights: *Application under s. 83.28 of the Criminal Code (Re),* 2004 SCC 42 at para 62.

[22] In the context of spousal sponsorships, the Federal Court of Appeal in *dela Fuente v Canada (Citizenship and Immigration),* 2006 FCA 186 at paras 34-36 [*dela Fuente*] discussed the application process of sponsoring a spouse:

> [34] Paragraph 117(9)(d) [of the *Regulations*] identifies "that application" as being the "application for permanent residence" made by the sponsor. This last phrase only appears in paragraph 117(9)(d) and the Act does not provide for a definition. However, the term "permanent resident" is defined as a person who has acquired that status (subsection 2(1)), and the *Act* provides that a foreign national becomes a permanent resident by establishing to the satisfaction of an immigration officer at a port of entry that he or she has applied for that status (subsection 21(1)), holds a visa and has come to Canada in order to establish permanent residence (and is not inadmissible) (subsection 20(1)(a)).
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> [35] The actual steps involved in that process insofar as they can be gleaned from the authorized form to which I have referred and the Operations Procedures Manuals appear to mirror this scheme. Based on the procedure outlined, the process is initiated by the filing at the designated visa office of an "Application for Permanent Residence in Canada" form which is completed in contemplation of the issuance of a visa for travel to Canada within the specified category. Once the visa is issued, the foreign national is invited to appear at a port of entry, visa in hand, and satisfy the immigration officer that he or she has come to Canada in order to establish permanent residence. If the officer is so satisfied, the foreign national is granted the right to enter Canada in order to establish permanent residence. That is how permanent resident status is acquired.
>
> [36] Thus, an application for permanent residence is initiated by the filing of the authorized form and the process ends at the port of entry when the foreign national is allowed to enter Canada as a permanent resident.

The Court concluded at para 51:

> … the phrase "at the time of that application" in paragraph 117(9)(d) of the *Regulations* contemplates the life of the application from the time when it is initiated by the filing of the authorized form to the time when permanent resident status is granted at a port of entry.

Accordingly, the Federal Court of Appeal has confirmed that the filing of an application is the first step in a process which concludes at the time when a decision to grant permanent residence is made. Although *dela Fuente* concerned the interpretation of the phrase "at the time of that application" under paragraph 117(9)(d) of the *Regulations*, the Court's general comments on the nature of an application for permanent residence are helpful in the case at bar.

[23] The *dela Fuente* decision is also consistent with *Gill*, where Chief Justice Crampton found that Ms. Gill, the sponsor, did not have an accruing or accrued right to have her sponsorship application determined according to the law in place when she filed her notice of appeal:

> [39] Contrary to Ms. Kaur Gill's submissions, a right to have her spousal sponsorship application determined under the version of the Regulations that was in force prior to September 30, 2010 did not become accrued and did not begin to accrue as of the moment she filed her Notice of Appeal with the IAD.
>
> [40] This is because persons who make such applications have no accrued or accruing rights until all of the conditions precedent to the exercise of the right they hope to obtain under the application have been fulfilled (*R. v. Puskas*, [1998] 1 S.C.R. 1207, at para 14; *Apotex Inc. v. Canada (Attorney General)* (1993), [1994] 1 F.C. 742, at paras 56-63; *Scott v. College of Physicians & Surgeons Saskatchewan* [1992] SJ No. 432, at 718 (CA); *Kazi v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 948, at para 19; *Gustavson Drilling*, above). Until a final decision has been made on the application, the applicant simply has potential future rights that remain to be determined (*Bell Canada v. Palmer* [1974] 1 F.C. 186, at paras 12-15 (CA) [*Palmer*]; *McAllister v. Canada (Minister of Citizenship and Immigration)*, [1996] 2 FC

> 190, at paras 53-54); *Chu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 893, at paras 67-68). Stated alternatively, the applicant has no more than a hope that the application will be successful. There are no rights that may be retroactively or retrospectively affected by a change in the test applicable to spousal sponsorship applications. To the extent that this Court's decision in *McDoom v. Canada (Minister of Manpower and Immigration)* [1978] 1 F.C. 323, which dealt with a significantly different legislative regime, stands for the contrary position, I respectfully decline to follow that decision.

[24] Since *Gill*, this Court has repeatedly held that the right to sponsor a family member does not vest, accrue, or begin to accrue until an affirmative decision is made in respect of the application: *MacDonald* at para 25; *Dalumay* at paras 24-25; *Lukaj v Canada (Citizenship and Immigration)*, 2013 FC 8 at para 22.

[25] In this case, both the visa officer and the IAD were consistent in applying the version of the *Regulations* in force of the time of their respective decisions. The IAD was correct in its determination of the applicable version of the *Regulations*.

C. *Did the IAD err in assessing the marriage?*

[26] The IAD concluded that the marriage was an effort to assist Mr. Griffith to stay in Canada. The Applicants admitted during the hearing that they would not have married so soon if Mr. Griffith had not been under order to leave Canada and that they had married partly so Mr. Griffith could stay in Canada. Their admissions during the hearing, taken together with other factors, such as Mr. Griffith's immigration history, Ms. Burton's concealment of her marriage from her family, and their lack of cohabitation while Mr. Griffith was in Canada, constitute a reasonable basis to conclude that their marriage had been entered into primarily for the purpose of acquiring a status or privilege under the *IRPA*.

[27] In *Gill*, Chief Justice Crampton summarized the approach in assessing marriages pursuant to section 4 as follows:

> [29] […] A plain reading of section 4 of the Regulations reflects that these are two distinct tests. If a finding that a marriage is genuine precluded the possibility of a finding that the marriage was entered into primarily for the purpose of acquiring any status or privilege under the IRPA, the latter test would be superfluous. This would offend the presumption against statutory surplusage. (*R v Proulx*, 2000 SCC 5, at para 28, [2000] 1 S.C.R. 61).
>
> [30] It is well established that while there are strong links between the two tests in section 4, they are distinct. *(Sharma v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1131, at para 17*; Grabowski v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1488, at para 24; and *Keo v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1456, at paras 11-12. See also *Macdonald* v. *Canada (Minister of Citizenship and Immigration)*, 2012 FC 978, paras 18-19; *Elahi v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 858, at para 12; and *Kaur Gill v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 122, at para 13.)

[28] Because either test can dispose of an application, it is not an error to decline to consider the genuineness of the marriage when it has been found that the primary purpose of the marriage was immigration, which is what the IAD did in this case. Accordingly, the IAD was not required to do a genuineness inquiry.

[29] Furthermore, the direction of the court in *Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1077 [*Singh*] is instructive on the respective time frame for the primary purpose assessment:

> [20] What hasn't changed between the old and the new wording of the Regulations is that the past tense is used in reference to the primary purpose test ("was entered into"), while the present tense ("is not genuine") is used in relation to the genuineness test. Therefore the relevant time to assess the marriage's genuineness is the present, while the relevant time to assess the primary purpose of the marriage is in the past, i.e., at the time of the marriage. This

> is made clear by the use, in both the English and French texts of the Regulations, of the past tense respecting primary purpose (4(1)(a)) and the present tense for genuineness (4(1)(b)).

[30] Here, the IAD did not err when it concluded that at the time of entering this marriage, the Applicants did so primarily for the purposes of immigration. The decision was reasonable.

VI. Certified Questions

[31] The applicants have asked to have three questions certified. The first relates to the issue of which version of the *Regulations* should apply to these facts. This question was settled in *Gill*. An issue that has already been satisfactorily settled by the courts does not transcend the interests of the parties: *Dubrézil v Canada (Minister of Citizenship and Immigration)*, 2006 FC 142 at para 16. Mere disagreement with the decision in *Gill* does not justify certification.

[32] The two other questions proposed by the Applicants relate to an alleged inherent conflict in assessing primary purpose disjunctively from genuineness. The Applicants argue that the two prongs of subsection 4(1) are related and a finding that the marriage was genuine would imply that it could not have been entered for the primary purpose of immigration. They also submit that subsection 4(1) is *ultra vires* and contrary to public policy, as it violates the objectives of family reunification stated in the *IRPA*. These questions were respectively settled in *Gill* and the cases cited therein, and *Singh*.

[33] While I acknowledge the Court in *Singh* went on to certify a question, I am in agreement with its analysis and am moreover bound by the Federal Court of Appeal authorities upon which the Court relied: *Azizi v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 406 at paras 27-32; *dela Fuente* at para 48. As the Federal Court of Appeal noted in *Azizi*, the objective

of family reunification must be considered in light of the objective of maintaining the integrity of the immigration system. The proposed questions do not transcend the interests of the parties.

[34] I therefore decline to certify any questions. See *Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 and *Boni v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 68.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No questions are certified.

"Ann Marie McDonald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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