Federal Court Cour fédérale

Date: 20170419

Docket: IMM-3666-16

Citation: 2017 FC 369

Toronto, Ontario, April 19, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

JOSEPH THAVAPALAN LAWRENCE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

Overview

[1] This is an application for judicial review of a decision of a member of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada, made on August 9, 2016, dismissing the Applicant's appeal of the denial of his spousal sponsorship application.

[2] As explained in greater detail below, this application is allowed, because I find that the IAD erred in failing to consider the evidence surrounding the Applicant's relationship with his spouse, post-dating the time of the marriage, in assessing the primary purpose for which they entered into the marriage.

Background

[3] The Applicant, Joseph Thavapalan Lawrence, is a Canadian citizen, who married Kayalvili Pooranakumar, a citizen of Sri Lanka, on October 9, 2011. Ms. Pooranakumar had arrived in Canada in July 2009 and made a claim for refugee protection on February 24, 2010, which the Refugee Protection Division [RPD] refused on March 12, 2010. The Federal Court dismissed her application for leave for judicial review of the RPD decision on September 29, 2010. She then applied for a Pre-removal Risk Assessment [PRRA], which was refused on July 12, 2011, and the Federal Court dismissed her application for leave for judicial review of the PRRA decision on January 13, 2012.

[4] Ms. Pooranakumar sought a stay of removal on May 28, 2012, but the Federal Court denied the stay, and she was removed from Canada on May 29, 2012. Ms. Pooranakumar had also submitted an application for permanent residence on humanitarian and compassionate grounds on August 18, 2011, which application was still pending at the time of her removal.

[5] The decision under consideration in Mr. Lawrence's appeal to the IAD was made by immigration officers at the High Commission of Canada in Columbo, determining that the

relationship between Mr. Lawrence and Ms. Pooranakumar was entered into primarily for the purpose of Ms. Pooranakumar obtaining a status or benefit under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. As a result, s. 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] precluded her from being eligible to be considered Mr. Lawrence's spouse and sponsored by him for permanent residence.

[6] Mr. Lawrence appealed this decision, appearing before the IAD for two days of hearings, on May 2, 2016 and July 27, 2016, at which both he and Ms. Pooranakumar gave testimony. The IAD concluded that the relationship was entered into primarily for the purpose of Ms. Pooranakumar obtaining permanent resident status and therefore dismissed the appeal, observing that it was unnecessary to engage in an analysis of the genuineness of the marriage. That decision is the subject of this application for judicial review.

Analysis

[7] The IAD's decision, and the decision under appeal, turned on s. 4(1) of the IRPR, which provides as follows:

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.	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) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi; (b) n'est pas authentique.

[8] The parties agree that s. 4(1) prescribes a disjunctive test, under which a foreign national is not considered a spouse of a person if either the marriage was entered into primarily for the purpose of acquiring a status or privilege under IRPA or the marriage is not genuine. Therefore, a foreign national who originally entered into a marriage for the purpose of acquiring status or privilege, but whose marriage grows over time into a genuine marriage, is nevertheless barred from coming to Canada to live with his or her lawful spouse (see *Singh v Canada (Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness)*, 2014 FC 1077 [*Singh*], at para 7).

[9] However, it became apparent in the course of oral submissions on this application that the principal divergence in the parties' positions surrounds the evidence that should be taken into account in considering the two prongs of the test under s. 4(1)(a) and (b). Mr. Lawrence argues that, in reaching its conclusion under s. 4(1)(a), as to the primary purpose for which the marriage was entered, it was an error for the IAD not to consider evidence related to the genuineness of the marriage which postdates the time of the marriage. In contrast, the Respondent, the Minister of Citizenship and Immigration, takes the position that only evidence leading up to the time of the marriage should be considered in assessing the primary purpose for which it was entered.

[10] The Minster supports this position by reference in particular to the decision in *Sandhu v Canada (Minister of Citizenship and Immigration)*, 2014 FC 834 [*Sandhu*], at paragraphs 10 and 12:

> [10] The respondent contends that the IAD considered the totality of the evidence in determining that the matter was *res judicata* and that the member's decision that the new evidence was insufficient to warrant the non-application of the doctrine of *res*

> *judicata* fell within the range of reasonable outcomes. Although the Minister accepted the marriage as genuine, this took into account all evidence up until the hearing date. By contrast, the assessment of the primary purpose of the marriage is a snap shot in time – it looks to the motivation of the parties at the time the marriage took place.
>
> ….
>
> [12] A finding that a marriage is genuine weighs "significantly in favour of a marriage that was not entered into for the purpose of gaining status in Canada" (*Sharma v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1131, [2009] FCJ No 1595 at para 17). However, the finding that a marriage is genuine is not determinative of primary purpose. In part, this is due to the differing points in time at which the separate tests are evaluated:
>
> … 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" (emphasis added). 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. I agree with the Respondent that testimony by those parties regarding what they were thinking at that time typically will be the most probative evidence regarding their primary purpose for entering into the marriage. (Gill, above, at para 33) [Emphasis in original]

[11] I do not find the decision in *Sandhu* to support the Minister's position. *Sandhu* explains that the assessment of the primary purpose for entering into a marriage is intended to focus upon the motivations of the parties to the marriage at the time of the marriage. However, it does not state that this assessment is to be performed through consideration only of evidence that relates to the time period leading up to the marriage. To the contrary, as argued by Mr. Lawrence, the Court in *Sandhu* states the following at paragraph 13:

> [13] Evidence of commitment subsequent to the marriage can be used to prove the primary purpose of the marriage. This might

> include evidence of a continuing relationship or the birth of a child.
> …

[12] Mr. Lawrence therefore argues that the IAD erred in failing to take into account evidence of the genuineness of his marriage, postdating the time of the marriage, in performing its primary purpose assessment. He notes that, in adopting this approach, the IAD considered two decisions of the Federal Court which the IAD regarded as offering divergent interpretations of s. 4(1) of the IRPR. The IAD quoted paragraph 15 of *Gill v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 902 [*Gill 2014*], in which Justice O'Reilly stated as follows:

> [15] It is clear that there are two distinct considerations involved in these kinds of cases – the genuineness of the marriage and the primary motivation for it. An applicant for permanent residence is not considered a spouse if the marriage is not genuine or if the motivation for it was primarily for an immigration purpose. But the two considerations are related (*Grabowski v Canada (MCI)*, 2011 FC 1488, at para 24). This means that the stronger the evidence regarding the genuineness of the marriage (and where there is a child involved, this is strong evidence on its own), the less likely it is that it was entered into primarily to obtain an immigration advantage (*Gill v MCI*, 2010 FC 122, at para 6-8). And vice versa. The more compelling the proof that the couple was seeking immigration status, the more likely it will be that the marriage was not genuine.

[13] The IAD contrasted this analysis with Justice Brown's decision in *Singh*, which emphasized the disjunctive nature of the test in s. 4(1) of IRPR, i.e. the fact that, if either of the two elements of the test (genuineness of the marriage and intention of the parties) is not met, the exclusion in s. 4 applies. The IAD stated its preference to follow the reasoning in *Singh*, which it found to be more consistent with the plain reading of s. 4(1).

[14] In defence of the IAD's decision, the Minister takes the position that *Gill 2014* misstates the law. Mr. Lawrence argues that *Gill 2014* and *Singh* are reconcilable. I agree with Mr. Lawrence's position. I do not read *Gill 2014* to conflict with the interpretation of s. 4(1) of the IRPR as prescribing a disjunctive test. Rather, the point Justice O'Reilly is making in paragraph 15 of *Gill 2014* is that evidence relevant to one element of the test can also be relevant to the assessment of the other element. This point is expressly acknowledged in paragraph 26 of *Singh*, where Justice Brown states his understanding that there may be some overlapping evidence between primary purpose and genuineness, even given the differences in their temporal focal points. Similarly, at paragraph 12 of *Sandhu*, Justice Martineau states that a finding that the marriage is genuine weighs significantly in favour of a marriage that was not entered into for the primary purpose of gaining status in Canada, although noting that the finding that a marriage is genuine is not determinative of primary purpose.

[15] It is therefore clear that evidence which postdates the time of marriage, and speaks to the genuineness of the marriage (or lack thereof) can be relevant to the assessment of primary purpose. The remaining question is whether the IAD's interpretation of s. 4(1) of IRPR and its failure to take into account such evidence amounts to a reviewable error in the present case. In that respect, Mr. Lawrence acknowledges the decision of Chief Justice Crampton in *Gill v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1522 [*Gill 2012*], at paragraph 32, to the effect that failure to take into account post-marriage evidence does not necessarily constitute an error:

> [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 (*Kaur Gill*, above,

> at para 8). 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.

[16] Mr. Lawrence argues that the standard of correctness may apply to this question, given that it involves an exercise in statutory interpretation. The Minister argues that reasonableness is the applicable standard, as the question involves a matter of mixed fact and law. I prefer and adopt the Minister's position that the standard is reasonableness (see *Dalumay v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1179, at para 19).

[17] The IAD's decision is therefore entitled to deference. The IAD concluded that, given its finding on primary purpose and the disjunctive nature of the test, it was not necessary to consider whether the marriage was now genuine. It therefore did not engage in the analysis regarding the genuineness of the marriage, the second element of the test. In that, I find no error.

[18] However, the IAD also declined to give any consideration to the post-marriage evidence and the impact that evidence might have had on the assessment of primary purpose. Mr. Lawrence refers in particular to the evidence that, since their marriage over the course of five years, he has made numerous return trips to Sri Lanka to visit his wife, that they speak over the phone for hours a day during his employment as a truck driver, and that he provides her with regular financial support. Unlike in *Gill 2012*, where the Court noted that the post-marriage evidence had been assessed in consideration of genuineness, that evidence received no consideration at all by the IAD in Mr. Lawrence's case. I am also concerned that, in declining to consider that evidence, the IAD was labouring under a misunderstanding that it was required to choose between interpretations of s. 4(1) provided by *Gill 2014* and *Singh*, and therefore did not

recognize that, as explained in *Gill 2014*, post-marriage evidence relevant to genuineness can also be relevant to the assessment of primary purpose. For these reasons, I find the IAD's failure to consider this evidence to render its decision unreasonable.

[19] It is therefore my decision that the IAD's decision should be set aside and returned to a different panel for redetermination. It is unnecessary for the Court to consider the other grounds of review argued by Mr. Lawrence. No question was proposed for certification for appeal, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is remitted back to a differently constituted panel of the Immigration Appeal Division of the Immigration and Refugee Board for reconsideration in a manner consistent with the above Reasons. No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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