Federal Court Cour fédérale

Date: 20190326

Docket: IMM-5546-17

Citation: 2019 FC 374

Ottawa, Ontario, March 26, 2019

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

KAI HAM FUNG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Kai Ham Fung [the Applicant] seeks judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of the November 30, 2017 decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada [IRB].

[2] The Applicant's wife had applied for a permanent resident visa as a member of the family class. A Visa Officer [Officer] in Hong Kong determined that the Applicant and his wife were not in a genuine relationship and that he had insufficient funds to sponsor her and their 20 year old daughter.

[3] The Applicant appealed to the IAD. The appeal was refused when the IAD found that the marriage was not genuine and was entered into for the purpose of achieving a status under the *IRPA* [the Decision]. Given that determination, the IAD did not deal with the sufficiency of funds issue.

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

II. **Background Facts**

[5] The Applicant is a 62 year old citizen of Canada who was born in China. The Applicant married his first wife in 1979. They had four children prior to coming to Canada in 1997. On August 10, 2013, the Applicant and his first wife were divorced.

[6] The Applicant's current wife is a 49 year old Chinese national. The Applicant met her some time in 1995-1996 on a construction site in China where he was working. She was a cook at the site. In early 1996, she told the Applicant that she liked him but he said he was married and had children so she should find someone else.

[7] After a celebratory work party in June 1996, the Applicant and his current wife had sex. It resulted in her becoming pregnant. When she subsequently told the Applicant that she was

pregnant, he told her to have an abortion because he could not marry her. She decided to have the baby and her daughter was born in March, 1997.

[8] When his wife tried to tell the Applicant of the baby, she learned that he had moved to Canada to join his first wife. They then lost contact with each other.

[9] In December 1998, after the Applicant had left for Canada, his wife married a man in China. They eventually divorced in 2006 after he developed substance abuse issues.

[10] In 2008, after separating from his first wife, the Applicant returned to work in China. In 2009, the Applicant's wife learned that he had returned to China. She arranged through a neighbour in the village to meet him on March 2, 2009 at his work site, with her daughter. In June, 2009 they began living together in China until September 8, 2010 when the Applicant moved back to Canada. According to his wife's testimony, they were then in touch by telephone two or three times a week.

[11] In 2010, the Applicant told his first wife about the child; she subsequently agreed to divorce him. The divorce took effect in August 2013. In September 2013, the Applicant and his wife were married in China.

[12] In 2014, the Applicant sponsored his wife and his daughter to immigrate to Canada.

III. **Legislation**

[13] The parts of the legislation which are most relevant to this matter, as identified by the IAD, are subsection 12(1) of the *IRPA* and paragraph 117(1)(a) and subsection (4)(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 *IRPR*:

IRPA	*IRPA*
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.	12(1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.
IRPR	*IRPR*
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.
117 (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	117 (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :
(a) the sponsor's spouse, common-law partner or conjugal partner;	a) son époux, conjoint de fait ou partenaire conjugal;

IV. **Issue and Standard of Review**

[14] The only issue is whether the findings by the IAD that the marriage between the Applicant and his wife is not genuine and it was entered into for the purpose of achieving a status under the *IRPA* were reasonable.

[15] The Applicant submits that the IAD gave insufficient weight to the existence of a child of the marriage and it made unreasonable credibility findings.

[16] The parties and the Court agree that the standard of review for findings made by the IAD, an expert administrative tribunal, as to whether a marriage is genuine or, was entered into for immigration purposes, is reasonableness.

[17] Under the reasonableness standard, the IAD is owed deference and the Decision should only be set aside where there is an erroneous finding of fact made in a "perverse and capricious manner or without regard for the material before it": *Singh v Canada (Citizenship and Immigration)*, 2014 FC 1077 at para 9; *MacDonald v Canada (Citizenship and Immigration)*, 2012 FC 978 at para 16.

V. **The Officer's Decision**

[18] The Officer found that there was a lack of evidence to support the genesis and development of the relationship between the Applicant and his wife. The Officer noted that:

- they had an affair and then did not keep in contact for many years;
- they suddenly rekindled their relationship to get married;

- the Applicant applied for his family – his children and first wife – to live in Canada after he separated from his wife;
- the Applicant moved to Canada after knowing his wife was pregnant and telling her to have an abortion;
- there was a lack of objective evidence to prove that the Applicant was the biological father of the child and his wife refused the chance to have a DNA test;
- the father's name on the birth certificate of the daughter had been amended; and
- there was no genuine family or family plan.

[19] Prior to arriving at the decision, the Officer provided a fairness letter advising of the specific concerns and providing to the Applicant's wife an opportunity to respond to them. She was unable to provide a response that satisfied the Officer.

[20] The Officer also had financial concerns about the Applicant's ability to sponsor his wife but, as the IAD found it unnecessary to consider them, they are not recited here.

VI. **The IAD Decision**

A. *The Hearing*

[21] The IAD first began hearing the appeal on January 5, 2017. The testimony and cross-examination of the Applicant was completed that day, with the assistance of an interpreter. The hearing was to continue on April 6, 2017 but by then the Minister's counsel had changed and the member of the IAD was reaching the end of his mandate. The two counsel and the IAD agreed to adjourn the hearing to allow another member of the IAD to finish it. It was also agreed that to be fair to everyone the transcript from the first hearing would be used.

[22] The hearing resumed on August 29, 2017 before the member who rendered the Decision. The Applicant's wife and her daughter each testified by telephone. At the conclusion of their evidence, the Applicant briefly provided further clarifying testimony.

[23] At the end of the hearing, no time remained for oral submissions. The IAD therefore provided the opportunity for further written submissions to be received from the parties at times agreed upon by all.

B. *The Finding that the Marriage was not Genuine*

[24] The IAD identified the only issue as being whether the marriage between the Applicant and his wife is genuine.

[25] The IAD reviewed the relevant legislation and noted that under the *IRPR,* when sponsoring a spouse to come to Canada as a permanent resident, the marriage must be <u>both</u> genuine and not entered into for the purpose of obtaining any immigration status or privilege. If the Applicant fails to satisfy either requirement then the application will fail: *Nguyen v Canada (Citizenship and Immigration)*, 2016 FC 1207 at paras 15-16.

[26] The IAD Member also noted that: (1) the test of a genuine marriage is required to take into account variables such as culture and educational levels but it is, nonetheless, an objective test; and, (2) while the intention of both parties is relevant on appeal, the intention of the applicant (the Applicant's wife) is a key determinant.

[27] After stating that there were "profound" credibility concerns identified in the transcript from the first day of hearing and, in the subsequent hearing day, the IAD determined that "[b]oth

the appellant and the applicant were untrustworthy witnesses and… [it] cannot rely on anything they say as being truthful."

[28] The IAD then proceeded to review seven specific instances which the Member determined to be the most glaring examples of problems with the evidence. The Applicant objected to all the findings but has focused on three examples. He says that the IAD made unreasonable credibility findings with respect to each of them.

[29] The Applicant also submits that the IAD gave insufficient weight to the fact that the Applicant and his wife have a child together.

C. *The Credibility Finding as to when the Parties met*

[30] The Applicant challenges the credibility finding of the IAD that arose from his testimony regarding when he first met his wife. He first stated that he met her in 1995 but later said January, 1996. He worked out that date based on the fact that she was a cook at the camp for six months from January to June, 1996.

[31] His wife's testimony was that they first met in July, 1995. In the application for sponsorship questionnaire she completed, she stated that she first met the Applicant on August 10, 1995.

[32] The IAD noted the discrepancy, as between the Applicant and his wife in the dates, was "off by a year." The Applicant points out that it is only a six month difference. The Respondent replies that the reference to "a year" means a calendar year in that it was 1996 and not 1995. The Applicant replies that is reasonable given it was so long ago.

[33] I do not agree. The passage of time had nothing to do with the discrepancy. The Applicant's wife was very specific as to the exact day they met. The Applicant worked it out based on other information that he did remember.

[34] Regardless, whether the parties are six months or a year apart in their evidence on this point, it is clear that they do not agree. The IAD finding was that the question of when the Applicant and his wife met was a very important issue and their evidence was inconsistent. That finding is reasonable and it is supported in the record.

D. *The Credibility Finding as to the Marriage Proposal*

[35] In the sponsorship questionnaire, the Applicant's wife indicated that he proposed to her on July 10, 2013. She repeated this date at the IAD hearing.

[36] The Applicant said at the hearing that he and his wife decided to marry in June 2009. His counsel submits that deciding to marry is not the same as proposing, so there is no conflict in that evidence.

[37] The transcript shows that a bit later, on cross-examination, the Applicant was asked to explain the difference between the date he gave and the one his wife provided. At that time, he was specifically asked when he proposed - not when he decided to marry - and he confirmed that the proposal for marriage was in 2009. When asked to explain the reason for the different dates, his answer was "[m]aybe she remembered wrong."

[38] The IAD was troubled by the inconsistency and found the Applicant's explanation to be not reasonable. The IAD noted that in 2009, the Applicant had just reconnected with his wife and

learned about his daughter. He did not obtain his divorce until August 10, 2013. The IAD rejected the Applicant's explanation and found that his wife had the date right and he was wrong.

[39] The IAD was required to reconcile the conflicting stories and did so. The Court, having read the entire transcript, is satisfied that the finding made by the IAD was reasonably open to it on the evidence.

E. *The Credibility Finding as to the Wife's Employment*

[40] Another area of inconsistency identified by the IAD, which the Applicant challenges as being an unreasonable credibility finding, is what job the Applicant's wife had after her work at the job site ended. Her answer was that she had a job "as a waitress in some of the restaurants, cafés" in her village.

[41] Previously, the Applicant had testified that after she left the construction site his wife "went to the streets to sell clothes." Initially, he had responded that he did not know what she did but the Respondent's counsel pointed out that would mean he did not know what his wife was doing from 2009 to 2014. At that point, the Applicant said she was selling clothes.

[42] The Applicant was asked to reconcile why his wife had only indicated that she worked as a waitress when she filled out her sponsorship form. His answer was that he did not know but, when he met her again, she was selling clothes.

[43] After a series of other questions concerning her child, her ex-husband and the Applicant, counsel asked the Applicant's wife whether she had any other jobs in addition to being a waitress. At that point she said that during the daytime she worked as a waitress, the night time

she and her niece sold clothes. The reason that she did not put that on the sponsorship form was that she forgot. Similarly, when asked to speculate as to why her husband did not say she was a waitress the answer was "he forgot" followed by "for the whole time I have been a waitress."

[44] Certainly, the IAD was in the best position to reconcile this conflicting testimony. The Member referred to this testimony, together with two other examples, as one of the "less significant concerns" to illustrate the overall extent of the profound evidentiary concerns formed by the Member after listening to the testimony. The record clearly supports the finding.

F. *Did the IAD give Insufficient Weight to the Child of the Marriage?*

[45] The heart of the Applicant's case is that there is a child of the marriage and, as the Applicant is the father that is a strong factor in favour of granting the visa. The evidence is that the Applicant and his wife re-connected because of the child and, he now has a relationship with her.

[46] The Applicant's daughter, who is now 21 years old, testified that she first learned of her biological father in March, 2009 and she has had an ongoing relationship with him since then. When he is in China, they spend time together at the lake and cycling. When he is in Canada, she speaks to him four or five times a week. Her plan is to live with her father if she is permitted to live permanently in Canada.

[47] Counsel relies on the jurisprudence, particularly *Gill v Canada (Citizenship and Immigration)*, 2010 FC 122, [*Gill*], to urge that in assessing the legitimacy or genuineness of a marriage, great weight must be attributed to the birth of a child. Where a child's paternity is

accepted, as it was in this case, there is said to be an evidentiary presumption in favour of the genuineness of the marriage. The IAD must proceed with great care “because the consequences of a mistake will be catastrophic to the family”: *Gill,* at para 6.

[48] The Respondent acknowledges that there is a child but says the Applicant is asking the Court to re-weigh the evidence. The presumption is not determinative and it can be displaced “where the lack of credible evidence is so striking that the credibility issues overshadow the evidence concerning the child” as found in *Lamichhane v Canada (Citizenship and Immigration)*, 2016 FC 957 (at paragraph 14) and other cases of this Court.

[49] The IAD was fully aware of the importance of a child of the marriage. It acknowledged that *Gill* provides that “substantial weight is to be attributed to the birth of a child to the marriage as evidence of the genuineness of such a marriage.” It accepted that the Applicant and his wife have a child together but noted that there were still a number of issues with the evidence as to the genuineness of the marriage. Specifically, there was a problem with the overall untrustworthiness of the evidence provided by the Applicant and his wife.

[50] The credibility concerns were greater than the ones noted so far.

[51] The Officer had come to the same conclusion that the marriage was not genuine partly due to the answers given by Applicant’s wife at that time she was interviewed. When she was asked whether the Applicant was the biological father of her daughter, her answer was that she was unsure as she had a relationship with another man at that time. When offered a DNA test, she refused.

[52] At the IAD hearing two DNA tests were put in evidence. Although the IAD gave little weight to the one from China because of conflicting evidence by the Applicant's wife, it accepted the second test established that the Applicant is the father of her child.

[53] The IAD came to the conclusion that it could not rely on anything the Applicant and his wife said as being truthful as they were both untrustworthy witnesses. In addition to the findings already reviewed, the IAD had several other problems with the evidence:

- the Applicant was not truthful about his interactions with his former wife after they separated and divorced; he continued travelling and caring for her well after the time they separated and during the timeframe when he was involved with his current wife;
- the Applicant's wife testified that her daughter was conceived in June 1996 and that she met her first husband in mid-1998 but she told the Officer that the two men with whom she was in a relationship in June 1996 were the Applicant and her first husband;
- the Applicant gave conflicting reasons for divorcing his first wife including, in his narrative that when he told her in 2010 about his daughter she became angry and agreed to divorce; subsequently, when questioned he said their characters did not match each other and they separated in March 2008 before he knew of his daughter and finally, at the hearing he said his marriage broke down around 2008/2009 because he heard his first wife had another man; and
- the Applicant and his wife gave inconsistent evidence concerning when they started to live together; his wife said March 2009 after the Spring Festival and the Applicant said June 2009 but when questioned he then said that in March they started to contact each other and began to live together in June.

[54] The untrustworthiness of the evidence arose from the conflicting, inconsistent and changing evidence given by the Applicant and his wife. That was coupled with the Applicant's inability to recall several details such as when he and his wife were married and the multiple different reasons he provided for divorcing his first wife.

[55] The IAD had the benefit of a transcript of the first day of hearing and of seeing and hearing the Applicant on reply. The IAD heard the Applicant's wife and her daughter. In assessing the evidence the IAD therefore enjoyed a significant advantage over the Court. There is no doubt that it is owed deference with respect to the credibility findings made and the conclusions drawn.

[56] A review of the transcripts confirms that neither the Applicant nor his wife testified in a straightforward manner. I am not persuaded that the IAD committed any error in determining that the credibility issues overshadowed the evidence concerning the child. There certainly is support in the record for the multiple negative credibility findings.

VII. **Obiter**

[57] Although not relied upon by the IAD with respect to the significance of the birth of the child, I would be remiss if I did not comment upon whether the presumption set out in *Gill* should apply on these facts.

[58] The Applicant submits that as was said in *Gill*, the consequences to the family of making a mistake in assessing the genuineness of a marriage will be catastrophic. As a result, it would not be unreasonable to apply an evidentiary presumption in favour of the genuineness of a marriage because parties to a fraudulent marriage would be unlikely to risk the lifetime responsibilities associated with raising a child.

[59] Both the IAD and the Respondent accepted that the Applicant is the father of the daughter. The Respondent urged, and the IAD found, that the credibility concerns were sufficient to overcome the presumption.

[60] The presumption is based on the birth of a child to an existing family relationship. The presumption is an evidentiary means to establish the genuineness of that relationship. Here, the child was born as a result of one sexual encounter between the parties. There was no family, no marriage and no relationship between them at that time.

[61] The parties did not have any kind of relationship, marital or otherwise, with each other during the entire twelve year period from March, 1997 to February, 2009. The Applicant was in Canada, married to and living with his first wife. From March, 1998 to September, 2006, his current wife was married to and, together with her child, living in China with another man.

[62] Absent some extraordinary circumstance such as incarceration, to claim the benefit of the presumption that having a child together is proof of a genuine marriage requires the existence of a family relationship. This relationship should be in place at the time the child is born or within a reasonable period of time thereafter. What is reasonable would depend on the circumstances.

[63] Can the presumption arise in effect, retroactively, after more than a decade has passed during which the father had no contact with the mother and no knowledge at all of the existence of the child? While I question whether on the facts of this case the presumption can or should apply, I need not make that determination. I flag it merely for future consideration if applicable.

VIII. **Conclusion**

[64] The IAD thoroughly canvassed the evidence and reasonably determined that the Applicant and his wife were both untrustworthy witnesses. The credibility concerns were described as being “profound.” Numerous examples of contradictory statements were provided in the Decision.

[65] The conclusions of the IAD are supported by the evidence. The Court has reviewed the evidence, including the transcripts and documents in the record, and is in agreement with those conclusions. They are within the range of possible, acceptable outcomes based on the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*] It is not the role of the Court to re-weigh the evidence.

[66] If the reasons, when read as a whole, “allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met”: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16.

[67] I am satisfied, for the reasons set out above, that the *Dunsmuir* criteria have been met. The reasons permit the Applicant and the reviewing Court to understand why the IAD reached the conclusions it did and the Court is able to determine that the conclusion falls within the range of possible, acceptable outcomes based on the facts and law.

[68] The application is dismissed.

[69] There is no serious question of general importance for certification arising from the facts.

JUDGMENT in IMM-5546-17

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

"E. Susan Elliott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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