Federal Court Cour fédérale

Date: 20191011

Docket: IMM-5599-18

Citation: 2019 FC 1292

Ottawa, Ontario, October 11, 2019

PRESENT: The Honourable Mr. Justice Bell

Docket: IMM-5599-18

BETWEEN:

SHABBIR HUSSAIN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA AND MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Shabbir Hussain (Mr. Hussain), is a 64-year-old Canadian citizen. On November 5, 1976, he married Tasneem Shabbir (Ms. Shabbir) in a religious ceremony, which is not documented. The couple have four (4) children. Mr. Hussain arrived in Canada on September

10, 1988, as a visitor. In 1988, he divorced Ms. Shabbir, in accordance with religious custom. On October 14, 1993, he married his second wife, Violetta Suading Ognase, who sponsored him as a permanent resident. After becoming a permanent resident, Mr. Hussain sponsored his four (4) children and his mother to come to Canada. Between February 2001 and December 2002, Mr. Hussain's mother and children obtained permanent resident status. In March 2010, Mr. Hussain and his second wife divorced. Thereafter, Mr. Hussain returned to Pakistan and asked his first spouse to marry him again. They were married in Pakistan on May 3, 2010. Ms. Shabbir arrived in Canada in 2014 and continues to reside here without any lawful status, her visitor visa having expired.

[2] On September 15, 2010, Mr. Hussain submitted an application to sponsor Ms. Shabbir. An immigration officer at the Canadian High Commission in Islamabad, Pakistan refused the application. The Immigration Appeal Division upheld that decision on January 30, 2015. It is that decision which is the subject of the within application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 [the Act]. For the reasons set out below, I grant the application for judicial review.

II. Decision Under Review

[3] The determinative issue before the IAD was whether Ms. Shabbir falls within the class of persons described in subsection 4(1) and paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. The IAD concluded that Mr. Hussain had not proven on a balance of probabilities that his marriage to Ms. Shabbir is genuine and that it was not entered into primarily for the purpose of acquiring any status or privilege under the *Act*.

[4] In assessing the genuineness of the marriage, the IAD considered the factors set out in *Khera v Canada (Citizenship and Immigration)*, 2007 FC 632 at para 10. Among other things, the IAD was perplexed as to what could have transpired to cause Mr. Hussain to suddenly ask Ms. Shabbir to re-marry him after over twenty (20) years of separation, there having been minimal contact in the intervening period. It found that there was a lack of evidence of a rekindling of the relationship toward a marriage. The IAD concluded the motive for the marriage was the acquisition of permanent residence in Canada in order that Ms. Shabbir could be reunited with her children; namely, for the purpose of acquiring a status or privilege in Canada.

III. Relevant Provisions

[5] For the purposes of this judicial review, the relevant provisions are subsection 4(1) and paragraph 117(9)(*d*) of the *IRPR*, all of which are set out in schedule below.

IV. Issues Raised by the Applicant

[6] While numerous issues are advanced by Mr. Hussain, I am of the view the matter can be disposed of on the basis that the decision does not meet the requirements of reasonableness as defined in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51, [2008] 1 SCR 190 [*Dunsmuir*]. When examining whether a marriage is genuine or entered into for the purpose of acquiring a status or privilege under the *Act*, the question is one of mixed fact and law; hence, reviewable on the standard of reasonableness (*Kaur v Canada (Citizenship and Immigration)*, 2018 FC 657; *Moossavi-Zadeh v Canada (Minister of Citizenship and Immigration)*, 2017 FC 365 at para 17,

[2017] FCJ No 365 [*Moossavi*]; *Bercasio v Canada (Minister of Citizenship and Immigration)*, 2016 FC 244 at para 17, [2016] FCJ No 207 [*Bercasio*]).

[7] I will briefly review the issues raised by Mr. Hussain which I consider lacking any merit. He contends the IAD demonstrated bias or a reasonable apprehension of bias given the manner in which questions were asked and the nature of the panel member's employment before his appointment to the IAD. He also contends the IAD member demonstrated bias or bad faith when he forced Mr. Hussain to use the services of an interpreter when it was, according to Mr. Hussain, unnecessary.

[8] The applicable standard of review on questions concerning allegations of bias or apprehension of bias is correctness (*Coombs v Canada (Attorney General)*, 2014 FCA 222 at para 12; *Forefront Placement Ltd v Canada (Employment and Social Development)*, 2018 FC 692 at para 41). There exists a legal presumption that a tribunal is impartial. The test for rebutting that presumption has long been recognized as being "what would an informed person, viewing the matter realistically and practically—conclude" (*Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at p 372).

[9] With respect to the IAD member's past employment, Mr. Hussain suggests that the member was biased because he had been a "prosecutor" for the government on immigration matters. It is clear that employment did not involve Mr. Hussain or any parties to the application. It is also clear that the employment terminated approximately 10 years ago. There is no merit to this argument. Such an argument is akin to saying a prosecutor or a defence lawyer should not be

appointed to a criminal court. Yet, the qualifications acquired from such work should make them highly desired candidates. With respect to the IAD member's method of asking questions, I acknowledge they were probing but certainly would not lead an informed person viewing the matter realistically and practically to conclude any bias or apprehension of bias. Finally, with respect to the imposition of an interpreter, the IAD member engaged the interpreter to ensure that all answers and questions were clear and understood by him without ambiguity. There is no merit to an argument that a decision-maker demonstrates a bias or bad faith because he or she uses methods available to ensure the evidence is understood. On all counts the evidence falls far short of demonstrating a bias or a reasonable apprehension of bias on the part of the decision-maker.

[10] Mr. Hussain also contends that the IAD improperly permitted the Respondent to amend his response to the appeal before the IAD. The amendment related to an attempt to revisit the legitimacy of Mr. Hussain's divorce from Ms. Shabbir many years ago. While I may not have permitted the amendment, the IAD's decision on the motion constituted a procedural ruling within the jurisdiction of the IAD and one to which deference is owed. In any event, the fact the IAD rejected that particular defence to the appeal renders the issue moot.

[11] Finally, before moving on to the ground which I consider meritorious, I would simply observe that Mr. Hussain contends the decision is unreasonable in that it violates certain cultural norms and fails to advance family reunification, among others. With respect, I find it unnecessary to consider those allegations of "unreasonableness" given my findings below.

V. Analysis

[12] I now move to the one ground of review, which I consider to be meritorious. Where the reasonableness standard applies, the reviewing Court must show deference to the officer's decision, unless, among others, the decision is neither intelligible, transparent nor justifiable. I find the IAD's reasons demonstrate a lack of transparency and intelligibility. It stated as follows:

> The appellant [Mr. Hussain] was represented by counsel and appeared in person at the appeal hearing. **<u>He did not give oral evidence pertaining to the grounds of refusal</u>**. Counsel though relies on the appellant's Affidavit of September 14, 2017 to support the genuineness of the marriage and that it was not entered into primarily for the purpose of the applicant [Ms. Shabbir] acquiring any status or privilege in Canada. The applicant [Ms. Shabbir] testified in person at the appeal hearing. The appellant [Mr. Hussain] filed five exhibits of documentary evidence within the prescribed time pursuant to the *IAD Rules*.
>
> [Emphasis added]

[13] The observation that Mr. Hussain did not provide oral testimony is incorrect. The suggestion that he did not testify "pertaining to the grounds of refusal" is also incorrect. From page 656 to page 682 of the Certified Tribunal Record one reads the recording of the oral testimony of Mr. Hussain. One also readily observes that counsel for the Minister asked numerous questions regarding the "grounds of refusal". I provide the following exchanges as non-exhaustive examples:

[…]

> MINISTER'S COUNSEL: I am turning to your affidavit that is in ExhibitA4, paragraph 6; let me first ask you at page 4 there is a signature there, is that your signature?
>
> APPELLANT: Yes. (page 656, lines 48 and 49; page 657, line1)

[…]

> MNISTER'S COUNSEL: Did you divorce your wife in Pakistan before you came to Canada?

APPELLANT: No, in Canada. (page 657, lines 20-23)

[…]

MINISTER'S COUNSEL: So, when did you divorce your wife?

APPELLANT: I believe in 1991, 1992 or 1990, I do not remember the date.

MINISTER'S COUNSEL: And how did you divorce her?

APPELANT: On the phone.

MEMBER: On the phone?

APPELLANT: Yes, in Islamic relations you just have to spell it out three times that I am divorcing you. (page 658; lines 12-18).

[…]

MINISTER'S COUNSEL: So, why suddenly in 2010 on a visit did you ask her to marry you?

APPELLANT: No, we had after 2008 or 2009, I had …just like me and Violetta we decided divorce in 2009, we were having discussion on this one and at that time when I called to my mom then at that time she was also there and when I went to 2010, I stayed there, after couple of weeks, I offered her (inaudible).

MINISTER'S COUNSEL: But I am trying to understand why?

APPELLANT: Just because of the (inaudible)…

MINISTER'S COUNSEL: Just because of what?

APPELLANT: …. Affection was there.

MEMBER: So, because your affection was there?

APPELLANT: For the family, for myself, because I am not young anymore and she was no and she had nobody as … other than me. So, it was given by the choice with my family and everybody and myself also I wanted to have marriage with her. (page 670, lines 28-49)

[…]

> MINISTER’ COUNSEL: So, prior to your remarriage to her in 2010, did you discuss with her your marriage with your second wife, your Canadian wife?
>
> APPELLANT: Yeah, I discuss with her.
>
> MINISTER’S COUNSEL: So, what did you discuss with her?
>
> APPELLANT: Because when we decided to divorce and then I said well I do not know what to do, what … how I can go on because I had the Hepatitis C, so that is why was not so much problem and no so much moving around. So, then when I decided to go to Pakistan and when I met her and we discussed these things, definitely we said we would get married.
>
> MINISTER’S COUNSEL: Well, was your health … a reason … for getting remarried to her?
>
> APPELLANT: It was the affection, it builds up, yeah, I cannot even explain you in the words the feelings and all these things. (page 671, lines 10-34)
>
> […]
>
> MINISTER’S COUNSEL: … I am talking about how was your affection for your current wife already there in 2009?
>
> APPELLANT: This one we are talking about 2010, 2010 I went there, spent time and even in 2009 also, I spent time. You have to check the dates, already the dates are there.
>
> MINISTER’S COUNSEL: Okay. (page 674, lines 20-27)

[14] The above excerpts demonstrate that Mr. Hussain testified orally before the IAD and that he testified about the very issues surrounding the genuineness of the marriage as they pertained “to the grounds of refusal”.

[15] A decision is not reasonable if it lacks transparency and intelligibility. Both are lacking when a decision-maker says someone failed to testify on relevant issues when they did. The decision under review is not one where a decision-maker simply forgot that an inconsequential

witness had filed an affidavit and testified orally. Here, the witness was one of the principal players in the drama. His oral testimony was entitled to consideration and assessment in reaching the ultimate decision regarding the genuineness of the marriage or in determining whether it was entered into for the purpose of acquiring any status or privilege under the *Act* (*Zhong v Canada (Citizenship and Immigration)*, 2017 FC 223 at paras 27-28; *Diaz v Canada (Citizenship and Immigration)*, 2014 FC 389 at paras 10-11).

VI. Certified Question

[16] The parties made submissions regarding a potential certified question dealing with the disjunctive nature of the two-part test set out in paragraph 4(1)(a) and (b) of the *IRPR* and the potential for evidentiary overlap in considering those tests. Given the basis upon which I have decided this matter, there is no serious question of general importance which merits consideration that would be dispositive of this judicial review (*Begum v Canada (Citizenship and Immigration)*, 2018 FCA 181 at para 39*; Nguesso c. Canada (Citoyenneté et Immigration)*, 2018 CAF 145 at para 21). I decline to certify a question for consideration by the Federal Court of Appeal.

VII. Conclusion

[17] The application for judicial review is allowed. The decision of the IAD is quashed. For reasons of judicial and administrative economy, the matter is remitted to the same member of the IAD with directions to consider the whole of the existing record, including the *viva voce* testimony of Mr. Hussain, and to receive further submissions from the parties.

SCHEDULE

Immigration and Refugee Protection Regulations (SOR/2002-227)

Bad faith

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.

Excluded relationships

117 (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if

[…]

(d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and

Règlement sur l’immigration et la protection des réfugiés (DORS/2002-227)

Mauvaise foi

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.

Restrictions

117(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :

[…]

d) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d’une demande à cet effet, l’étranger qui, à l’époque où cette demande a été faite, était un membre de la famille du répondant n’accompagnant pas ce

was not examined.

dernier et n’a pas fait
l’objet d’un contrôle.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted without costs. The matter is remitted to the same panel of the Immigration Appeal Division with directions to consider the whole of the existing record, including the *viva voce* testimony of Mr. Hussain, and to receive further submissions from the parties. No question is certified for consideration by the Federal Court of Appeal.

"B. Richard Bell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5599-18
STYLE OF CAUSE:	SHABBIR HUSSAIN v MINISTER OF CITIZENSHIP AND IMMIGRATION AND, MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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