Federal Court  Cour fédérale

Date: 20220725

Docket: IMM-370-21

Citation: 2022 FC 1101

Ottawa, Ontario, July 25, 2022

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

BILL ULOMOGIARIE BLOCKER

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS AND JUDGMENT

[1] Mr. Bill Ulomogiarie Blocker (the "Applicant") seeks judicial review of the decision of the Immigration and Refugee Board, Immigration Appeal Division (the "IAD"), dated December 2, 2020. In that decision, the IAD dismissed his appeal from the decision of an officer (the "Officer"), denying his application to sponsor his wife, Ms. Rebecca Aigbekaen Blocker, for permanent residence, pursuant to the *Immigration and Refugee Protection Act*, S. C. 2001, c. 27 (the "Act") and the *Immigration and Refugee Regulations*, S.O.R./2002-227 (the "Regulations").

[2] The following facts and details are taken from the Certified Tribunal Record (the "CTR") and the affidavits filed by the parties. The Applicant filed the affidavit of Ms. Qamar Yasmeen Tyyebi, dated February 18, 2021, referring to several exhibits. The Respondent filed the affidavit of Ms. Carmelita Butts, sworn on September 28, 2021, attaching a transcript of the IAD hearing as an exhibit.

[3] The Applicant, a national of Nigeria, became a Canadian citizen in 2000.

[4] On February 27, 2006, the Applicant and Ms. Enabulele Emwenghomwen Charity Blocker married in Benin City, Nigeria. The marriage did not last.

[5] On June 12, 2012, the Applicant and Ms. Rebecca Aigbekaen Blocker "married".

[6] On October 22, 2012, the Applicant applied to sponsor Ms. Rebecca Aigbekaen Blocker, for permanent residence as a member of the Family Class. His application was refused on June 30, 2013, pursuant to subparagraph 133(1)(g)(i) and subsection 4(1) of the Regulations, on the grounds that the Visa Officer was not satisfied that the Applicant's marriage was genuine, and that he was in default of a previous sponsorship undertaking.

[7] The Applicant appealed to the IAD. In a decision dated April 20, 2016, his appeal was dismissed. The IAD found that the Applicant had failed to disprove the earlier findings that his "marriage" to Ms. Rebecca Aigbekaen Blocker had been entered into for immigration purposes and was not genuine.

[8] The Applicant filed another sponsorship application on April 29, 2019. This application was refused on January 28, 2020, on the grounds that the Applicant was in default of a previous undertaking, the “marriage” was not genuine and the “marriage” was entered into primarily for immigration purposes.

[9] Again, the Applicant appealed to the IAD. A hearing was scheduled for November 24, 2020.

[10] The evidence before the IAD for the hearing scheduled for November 24, 2020 included a divorce certificate showing that the Applicant had obtained a divorce from Ms. Enabulele Emwenghomwen Charity Blocker on July 20, 2016 from the Customary Courts Edo State of Nigeria at Ologbo. The evidence also included a marriage certificate recording that the Applicant married Ms. Rebecca Aigbekaen Blocker on July 30, 2016 in Benin City, Nigeria.

[11] Prior to the hearing of this appeal, the Respondent intervened and asked that the appeal be dismissed on the grounds that it was *res judicata*.

[12] The Applicant provided oral submissions on the issue of *res judicata* but was not allowed to make submissions on the merits of the appeal. He argued that the matter was not *res judicata*.

[13] The IAD did not hear the matter on its merits and by a decision dated December 2, 2020, dismissed the appeal on the grounds that it is *res judicata*.

[14] The IAD found that the same issue, that is the genuineness of the "marriage", had been decided by a different panel in the decision made on April 20, 2016.

[15] The December 2, 2020 decision is the subject of this application for judicial review.

[16] In his original submissions on this application for judicial review, the Applicant argued that the IAD breached his procedural fairness by refusing to hear the matter on its merits.

[17] He also argued that the decision of the IAD was unreasonable.

[18] The Minister of Citizenship and Immigration (the "Respondent") submitted there was no breach of procedural fairness and that the IAD reasonably applied the doctrine of *res judicata*.

[19] The hearing of the within application for judicial review was adjourned on December 7, 2021 to allow the parties to respond to the following Direction:

> Counsel are provided with the opportunity to address the following question: Did the IAD reasonably apply the principle of issue estoppel when there is an apparent factual error as to the status of the 2012 "marriage" between the Applicant and Rebecca Aigbekaen Blocker?

[20] The parties filed further submissions, including a Reply from the Applicant.

[21] In his further submissions, the Applicant argues that, in the face of evidence that his first "marriage" to Ms. Rebecca Aigbekaen Blocker was conducted before he had divorced his former

spouse, the decision of the IAD to apply the principle of *res judicata* was unreasonable since the first element of that doctrine was not met.

[22] The Applicant also argues that since the first "marriage" to Ms. Rebecca Aigbekaen Blocker was not a valid marriage, it could not be a "genuine" marriage for the purposes of the Act and of the Regulations. Otherwise, he submits that the decision is unreasonable since the IAD failed to understand the evidence about the status of his first "marriage".

[23] The Respondent advanced several arguments in his further submissions, without abandoning his original position, both written and in oral submissions made on December 7, 2021.

[24] The Respondent submits that the IAD reasonably applied the doctrine of *res judicata*, that the "same" marriage is in issue and that the Applicant misrepresented his status about his marriage when he first applied to sponsor his current spouse. He also submits that the within application should not be heard since the Applicant did not appear before the IAD in 2016 with clean hands.

[25] In submissions, the Respondent referred to "relationship". That is not the language of the Act or of the Regulations. Subsection 4(1) of the Regulations is relevant and provides as follows:

Bad faith	**Mauvaise foi**
4 (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a	**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

conjugal partner of a person if the marriage, common-law partnership or conjugal partnership	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.

[26] Any issue of procedural fairness is reviewable on the standard of correctness; see the decision in *Canada (Minister of Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339.

[27] The merits of the decision are reviewable on the standard of reasonableness, following the direction in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 S.C.R. 653.

[28] In considering reasonableness, the Court is to ask if the decision under review "bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on that decision"; see *Vavilov*, *supra* at paragraph 99.

[29] It is not necessary for me to address the Applicant’s arguments about procedural fairness since, in my opinion, the decision does not meet the legal standard of reasonableness.

[30] The IAD based its negative decision upon its finding that the Applicant's appeal was *res judicata*, on the basis that the validity of his marriage to Ms. Rebecca Aigbekaen Blocker had already been decided.

[31] The test for the application of the principle of *res judicata* was set out in the decision of *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.). The doctrine requires a party to establish three elements as follows:

1. that the same question has been decided;
2. the decision was final;
3. and the parties in both proceedings are the same.

[32] The first issue is whether the same question has been decided.

[33] The point of departure is with the definition of "marriage" in the Regulations.

[34] The Regulations define "marriage" as follows:

> **marriage**, in respect of a marriage that took place outside Canada, means a marriage that is valid both under the laws of the jurisdiction where it took place and under Canadian law. (*mariage*)
>
> **mariage** S'agissant d'un mariage contracté à l'extérieur du Canada, mariage valide à la fois en vertu des lois du lieu où il a été contracté et des lois canadiennes. (*marriage*)

[35] At the time of his first “marriage” to Ms. Rebecca Aigbekaen Blocker, the Applicant was not divorced from his former spouse. The “marriage” with Ms. Rebecca Aigbekaen Blocker was not valid, within the scope of the definition of “marriage” in the Regulations.

[36] In my opinion, I can take judicial notice of the legal requirements in Canada, that the parties to a valid and legal marriage must be “unmarried” at the time of such marriage, as the result of the death of a previous spouse, a divorce from a previous spouse or never married.

[37] The fact that the first “marriage” was not legal, within the scope of the Regulations, means that there was no marriage.

[38] It follows, in my opinion, that the first element of the principle of *res judicata* did not exist. The IAD either ignored the evidence about the Applicant’s divorce or was unaware of the definition of “marriage” in the Regulations, or both, when it applied the principle of *res judicata*.

[39] I refer to paragraph 122 of *Vavilov*, *supra*:

> It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. ... [If] it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision’s text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances.

[40] The decision of the IAD fails to meet the standard of reasonableness and the decision will be set aside. The matter will be remitted to a differently constituted panel of the IAD for redetermination.

[41] It is not necessary for me to address the issue of the Applicant's default upon a sponsorship undertaking in light of my conclusion above.

[42] While my conclusions above are sufficient to dispose of this application for judicial review, it is appropriate to pass brief comments on some of the arguments advanced by the Respondent, in particular that the Applicant lacked "clean hands" and had "misrepresented" his status before the IAD.

[43] "Clean hands" is a doctrine associated with a plea for equitable relief. No authority was cited by the Respondent to support the idea that recourse to the IAD is a request for equitable relief. No plea or arguments were advanced by the Applicant seeking equitable relief. The submissions of the Respondent in this regard were irrelevant and unnecessary.

[44] The Respondent also made submissions about misrepresentation.

[45] The word "misrepresentation" evokes consideration of section 40 of the Act. A finding of misrepresentation has significant consequences for an applicant seeking a benefit under the Act. Misrepresentation was raised in the supplementary submissions filed by the Respondent on January 17, 2022.

[46] As noted by the Applicant, this is improper. There is nothing in the record to suggest that an allegation or finding of "misrepresentation", within the scope of section 40, was ever made about the Applicant.

JUDGMENT in IMM-370-21

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the Immigration and Refugee Board, Immigration Appeal Division is set aside and the matter remitted to a differently constituted panel for redetermination. There is no question for certification.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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