Federal Court Cour fédérale

Date: 20121010

Docket: IMM-1211-12

Citation: 2012 FC 1182

Calgary, Alberta, October 10, 2012

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

BALJIT KAUR DHALIWAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant arrived in Canada from India in 1991. She is now a Canadian citizen.

[2] The Applicant has applied five times to sponsor Jaswant Singh Dhaliwal, as her spouse, to enter and reside in Canada. These applications have been rejected each time. This is the fifth such application. The previous applications were rejected on the basis that the marriage was not genuine. Judicial review was sought in respect of two of those applications. Each was denied.

[3] On this, the fifth application, the matter went before the Immigration Refugee Board of Canada, Immigration Appeal Division (IAD). The appeal was dismissed on the basis of *res judicata* issue estoppel.

[4] In reviewing this decision, I will apply the standard of correctness as far as the law is concerned. The IAD applied the correct three part test:

a) the same question has been decided;

b) the judicial decision which is said to have created the estoppel was final; and

c) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which estoppel is raised or their privies.

[5] The IAD correctly stated and applied the law in this regard.

[6] There is, as the IAD correctly stated, an exception to the doctrine if there are special circumstances that arise. In this case, the special circumstances are that, since the last decision, the Applicant has given birth to a child in Canada. She alleges that Dhaliwal is the father. This allegation has not been contested.

[7] The question is whether the birth of this child is decisive new evidence capable of altering the results of the previous decisions. This issue is to be reviewed on the standard of

reasonableness. The IAD was aware that a child had been born and did consider that matter. It found that the birth of this child was not decisive new evidence which could be used to set aside the application of the doctrine of estoppel.

[8] The decision of the IAD in this regard is set out at paragraph 17 of the Reasons:

> *[17] I find the elements of res judicata are applicable in this case. All of the criteria are met, i.e., same question, same parties and final decision. The remaining question is whether or not there exist any special circumstances that would bring the appeal within the exception to the doctrine of res judicata. The Federal Court has confirmed that the mere existence of a child does not, on its own, establish the genuineness of a relationship.[12] In this case the issue of children, attempts to have children and knowledge of each other's circumstances in relation to having children were considered in previous appeals and nevertheless the Member concluded the marriage was not genuine and was entered primarily for the purpose of gaining status or privilege under the Act. Therefore, I find the birth of a child is not decisive fresh evidence. Based on the evidence before me, I find the appellant has not been established there exist any special circumstances that would bring the appeal within the exception to the doctrine of res judicata.*

[9] This Court has held that the birth of a child is not conclusive evidence of the genuineness of a relationship (*Antall* v *Canada (MCI),* 2008 FC 30 at paragraph 19; *Rahman v Canada (MCI),* 2006 FC 1321 at paragraph 29; *Singh v Canada (MCI),* 2006 FC 565 at paragraph 12; *Hamid v Canada (MCI),* 2007 FC 220 at paragraph 14).

[10] There is another case to consider, that of Justice Barnes in *Gill v Canada (MCI),* 2010 FC 122, in which he wrote at paragraph 6 that the birth of a child would ordinarily be sufficient to dispel any lingering concerns as to the genuineness of a marriage. The above cases were apparently not drawn to his attention. In any event that case can be distinguished in that in that

case the birth of the child was raised on the first application, whereas in the present case earlier applications had considered a miscarriage and the assertions that the couple was trying to have a family.

[11] In the present case, the IAD did consider the fact of the birth of a child but did not consider that to be evidence sufficiently decisive so as to displace the doctrine of estoppel. In the present case at least two of the previous decisions holding that the marriage was not genuine did consider that, in one case, there was a miscarriage and, in another case, that the couple were endeavouring to have a child. Nonetheless, in every case, the conclusion was that the marriage was not genuine.

[12] I find that the decision of the IAD was reasonable and consistent with the jurisprudence aforesaid.

[13] Accordingly, the application is dismissed without costs. Neither counsel requested a certified question and I will not do so.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the Application is dismissed;

2. no question is certified; and

3. no Order as to costs.

"Roger T. Hughes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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