Federal Court  Cour fédérale

Date: 20140902

Docket: IMM-1309-14

Citation: 2014 FC 834

Ottawa, Ontario, September 2, 2014

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

HARPREET KAUR SANDHU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board, dated February 18, 2014. The IAD dismissed the spousal-sponsorship appeal of Harpreet Kaur Sandhu [applicant] on the basis that the matter was *res judicata* or, in the alternative, the marriage was entered into for the primary purpose of acquiring status under the Act.

[2] The applicant is a Canadian citizen. She resides in Canada with her parents and brothers. Her spouse, Harpreet Singh, is a citizen of India and resides in India. Previous to their marriage, Mr. Singh resided in the United Kingdom for several years. He was there legally on work permits. The marriage between the applicant and Mr. Singh was arranged by their families shortly after his return to India. Their first conversation was in October 2009 and they first met in person on December 26, 2009. The couple agreed to the marriage on December 28, 2009. Although the marriage was arranged, the final decision to marry lay with the applicant and Mr. Singh. The marriage ceremony took place on January 3, 2010 in India. The applicant remained in India for 26 days following the ceremony before traveling back to Canada alone. Mr. Singh's parents were living in Canada and had a refugee claim in progress at the time of the wedding so were unable to attend.

[3] Mr. Singh applied for a permanent resident visa. He was sponsored by the applicant pursuant to paragraph 117(1)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]. He was interviewed by an immigration officer of Citizenship and Immigration Canada [CIC] in New Delhi on August 16, 2010. His application was rejected by CIC in the same month on the basis that the marriage between Mr. Singh and the applicant was not genuine and was entered into primarily for the purpose of acquiring permanent residence in Canada contrary to subsection 4(1) of the Regulations. This decision was appealed to the IAD. The appeal was dismissed on June 21, 2011. Despite the applicant's testimony which "reflected that the marriage is genuine for her when viewed through the culture context of her acquiescence to an arranged marriage", the IAD found that "[t]he substantial evidence of an immigration motivation by [Mr. Singh] and his family is in sharp contrast to the evidence of minimal

interaction and communication between the couple prior to marriage, and [Mr. Singh]'s limited personal investment with the [applicant] since the marriage" (first IAD decision at paras 14 and 21). Accordingly, the IAD concluded that "the weight of evidence indicates, on a balance of probabilities, that the marriage in this case was entered into primarily for the purpose of acquiring any status or privilege under the Act and that it is not genuine" (first IAD decision at para 22). No application for judicial review of this decision was commenced with the Federal Court.

[4] After the first decision of the IAD, the applicant gave birth to a daughter on June 9, 2012. Moreover, genetic testing established Mr. Singh as the child's biological father. In the meantime, Mr. Singh's made a second application for a permanent residence visa, which was also sponsored by the applicant, on November 15, 2011. He was interviewed again in New Delhi on August 28, 2012, through an English/Punjabi speaking interpreter. The immigration officer refused the application on the basis that the first decision of the IAD regarding the intent for entering into the marriage was final and conclusive. Therefore, the application was a matter of *res judicata*. He further concluded that no special circumstances existed, such as new evidence that would provide an exception to the doctrine. In the result, he decided that the marriage was not genuine and was entered into for the purpose of acquiring permanent residence in Canada.

[5] The applicant appealed the decision on the second spousal-sponsorship application to the IAD. The Minister conceded by letter in advance of the IAD hearing that there was sufficient new evidence to constitute an exception to the doctrine of *res judicata* and that the appeal should, therefore, be heard. However, at the opening of the hearing, Minister's counsel reversed

this position with respect to the primary purpose aspect of the test under subsection 4(1) of the Regulations. Written submissions on the issue were requested from the parties. Before the IAD, the applicant testified that she and Mr. Singh communicate daily via Skype, WhatsApp and Facebook. Records of this communication were submitted to the IAD and are provided in the certified tribunal record. The applicant also traveled to India for two trips of several months in duration to visit her husband. She had a third trip planned to commence two days following the IAD hearing that would be approximately five months in duration.

[6] The IAD dismissed this second appeal on the basis that the matter was *res judicata* or, in the alternative, the marriage was entered into for the primary purpose of acquiring status under the Act. The IAD noted that the preconditions of *res judicata* applied on the facts (second IAD decision at para 16). Specifically, these preconditions are: (1) the same issue has been previously decided in earlier proceedings; (2) the previous decision was a final judicial decision; and, (3) the parties to the present proceeding are the same parties as the parties to which the previous decision was applied (*Rahman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1321, [2006] FCJ No 1661 at para 15 [*Rahman*]). The IAD quoted *British Columbia (Minister of Forests) v Bugbusters Pest Management Inc*, 1998 CanLII 6467 at para 32 (BC CA) for the principle that *res judicata* requires "the exercise of judicial discretion to achieve fairness according to the circumstances of each case" (second IAD decision at para 17). Once it is established that the preconditions of *res judicata* are met, the decision-maker must then consider whether there are special circumstances, such as "decisive fresh evidence", to bring this appeal within the exception of the doctrine (second IAD decision at paras 14 and 18).

[7] According to the IAD, this is not the case (second IAD decision at para 18). In this regard, the IAD adopted the findings and reasoning of the first IAD panel on the issue of the primary purpose of marriage. It concluded that there was no fresh, decisive evidence that contradicted or refuted the reasoning of the original panel (second IAD decision at paras 19 and 20). The IAD reasoned that even though the applicant and Mr. Singh had a child together after the first decision, this did not refute the findings of the original panel regarding the purpose of entering into the marriage at the time that the marriage took place. The IAD concluded that the matter was, therefore, *res judicata* and dismissed the appeal (second IAD decision at para 20). The IAD considered the merits of the appeal in the alternative. Minister's counsel conceded that the marriage was genuine, but argued it was entered into primarily for the purpose of acquiring status under the Act. The IAD concluded the applicant's arguments were substantively the same as in the original hearing. It found the applicant had not met the onus required by section 4 of the Regulations.

[8] As noted in *Rahman*, above, at paras 11-12, each step of the *res judicata* analysis attracts a different standard of review. The applicant concedes that the IAD correctly determined that the pre-conditions of *res judicata* exist on the facts of this case. The only issue in the present matter is the second step – whether special circumstances exist to justify an exception. This is a discretionary decision. The parties agree that the reasonableness standard of review applies in such a case: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51 and 53, [2008] 1 SCR 190 [*Dunsmuir*]; *Canada (Minister of Citizenship and Immigation) v Khosa*, 2009 SCC 12 at para 46, [2009] 1 SCR 339 [*Khosa*]; and *Ping v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1121 at para 17 [*Ping*]. The determination of whether the marriage was entered into for the

primary purpose of acquiring privilege or status under the Act is also reviewable on the reasonableness standard (*Dunsmuir*, above; *Khosa*, above; *Gill v Canada (Minister of Citizenship and Immigration*), 2012 FC 1522 at para 17 [*Gill*]). In the case at bar, the IAD made a number of reviewable errors which renders its decision unreasonable.

[9] First, the applicant argues that the IAD incorrectly applied the "decisive new evidence" exception to *res judicata*, because it found *res judicata* applied simply on the basis that it reached the same conclusion on the issues as had the first IAD panel. The applicant says the panel need not ultimately come to a different conclusion than in the first decision; all that is required is evidence that "genuinely affects an evaluation of the intention of the parties" (*Punia v Canada (Citizenship and Immigration)*, 2013 FC 1078). The applicant says there is decisive new evidence available that did not exist at the time of first IAD hearing that is demonstrably capable of altering the result of the previous decision. This includes evidence of continued contact between the applicant and Mr. Singh and the birth of their child. The applicant also relies on the recognition by the Minister that the marriage is genuine to argue that the IAD was bound to make its own findings and could not just rely on the reasoning made by the IAD in its first decision.

[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.

[11] Unfortunately for the Minister, the lack of proper analysis in the impugned decision of the evidence (7 volumes and 1671 pages), including the testimony of Mr. Singh, which was heard by the IAD in a sort of *de novo* hearing, makes it impossible for the reviewing Court to verify whether the finding that there is no fresh decisive evidence is reasonable in light of the law and the particular facts of this case. I also agree with the applicant's counsel that the IAD took an overly restrictive and narrow view of the "primary purpose" test. Several points have been made in the jurisprudence related to the application of the doctrine of *res judicata* in the immigration context that are relevant to whether the decision of the IAD was reasonable in the circumstances of this case.

[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]

[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. Additionally, new evidence may be relevant to the analysis of genuineness of the marriage or primary purpose, even if similar evidence was adduced in the first IAD hearing (*Sami v Canada (Minister of Citizenship and Immigration)*, 2012 FC 539, [2012] FCJ No 552 at para 78 [*Sami*]). As pointed out by Chief Justice Crampton in *Gill*, above, at para 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 [Act] (*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.

[14] No two cases of *res judicata* are the same. Each must be decided on its own facts. Often applicants point to specific cases where similar facts, such as evidence of a continuing relationship, have been applied to provide an exception to the doctrine (see for example *Sami*, above and *Gharu v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 237 [*Gharu*]). However, "it is not the nature of the evidence that is determinative but how that evidence addresses or overcomes the earlier findings" (*Ping*, above, at para 24). For example, in the *Gill* case, the applicant had made a number of statements during the visa officer interview about his intention to immigrate in Canada and search for a wife to sponsor him. In dismissing the appeal, the IAD notes that there were credibility problems and observes in *Gill v Canada (Minister of Citizenship and Immigration)*, [2012] IADD No 624 at para 19:

> It is always difficult to assess primary purpose of a marriage because the decision to marry is intensely personal and private. In most instances the applicant is the one who stands to benefit by acquiring status or privilege under the Act and the task of the decision maker is often to determine what was going on in the applicant's head, or arguably heart, at the time of the marriage. Genuineness of the marriage may often be assessed through many external manifestations and may be evidenced by the degree of interaction and consequent knowledge, demonstrated by the appellant and the applicant. In marriages where an appellant is introduced to an applicant by family members of the applicant, in Canada who understandably wish to have their close relative living near by, gaining admission to Canada is undoubtedly a strong consideration. Looking at these competing considerations, where there is a genuine marriage, such as I have determined here, there needs to be compelling evidence that the primary purpose was other than to be in a genuine marriage, to overcome the implication that, while gaining admission to Canada was a significant factor, entering into a genuine marriage was the primary consideration. [Emphasis added]

[15] The present case is very different from *Gill* where there were clear statements of the applicant himself about his primary intention. The nature of the new evidence must be carefully analysed by the decision-maker. On the facts of some cases, the birth of a child may be sufficient to warrant the non-application of *res judicata*. However, where the facts on which the previous decision was decided very strongly support the finding that the primary purpose of a marriage is to acquire status under the Act, it is less likely that this will be sufficient. In order to be decisive new evidence, the evidence must genuinely affect the analysis or evaluation of the intention. Evidence which simply bolsters or attempts to create the intention after the fact will be insufficient (*Gharu*, above, at para 17). What makes this case different from other cases is the admission made by the respondent that the new evidence establishes the genuineness of the marriage.

[16] There is a major problem with the IAD's conclusion. In the decision under review, the IAD expressly adopts the reasoning of the first decision in the analysis of whether *res judicata* should apply. However, what was required was consideration of whether the evidence that was not available at the time of the previous IAD could genuinely alter the analysis of the primary purpose of the marriage. By simply adopting the previous analysis as his own, the member fails to properly consider whether this analysis could be changed. As noted above, the non-application of *res judicata* does not require that the outcome necessarily be different than the previous decision, only the analysis. This is especially true in light of the fact that the first decision also found that the marriage was not genuine. Minister's counsel conceded at the outset of the second IAD hearing that the marriage was genuine. It follows that the evidence adduced in the second appeal genuinely alters the analysis under section 4 of the Regulations. As aforesaid, although the tests for genuineness of the marriage and primary purpose are different, there are strong links between the two (*Gill*, above, at para 30). For the decision to be reasonable, the IAD must at least consider why the evidence changes the outcome for the first part of the test (genuineness of the marriage), but does not genuinely alter the analysis of the second part of the test (primary purpose), so much that the Assistant Deputy Chairperson of the IAD determined that *res judicata* did not apply based upon documentation and submissions of the parties, and ordered a full hearing of the appeal (second IAD decision at paras 7 and 9).

[17] Alternatively, the IAD determined that the marriage was entered into for the primary purpose of acquiring status under the Act. I reiterate that the onus is on the applicant under section 4 of the Regulations to establish that the marriage is both genuine and not for the primary purpose of acquiring status under the Act. As discussed above, new evidence was adduced by the

applicant in the second appeal in an attempt to meet this onus. Additionally, both the applicant and her spouse provided *viva voce* evidence. In *Gill*, above, the Court notes that the testimony of the parties is the "most probative evidence regarding their primary purpose for entering into the marriage" (at para 33). In adopting the reasoning of the previous decision, the IAD does not in any way address the *viva voce* evidence of the parties at the second appeal. Nor does the IAD address the new, fresh evidence adduced by the applicant beyond stating it had considered all the evidence before it. No analysis is provided whatsoever. In this case, there is clear evidence that might alter the outcome if properly considered in its totality: in particular, evidence of a continuing relationship, 2-3 trips to India of several months in duration, and the birth of a child. While the IAD has discretion to decide the evidence put forward did not amount to decisive evidence, the type of evidence adduced in this matter has been held to be fresh, decisive evidence in previous judicial reviews of spousal-sponsorship applications. The IAD must address why it does not constitute such evidence in the present case beyond simply adopting the reasons of the previous panel. The failure to do so indicates that the evidence was not properly considered in its totality.

[18] According to *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*], a reviewing court may look to the tribunal record to draw inferences from the decision of the IAD where gaps exist in the reasoning. However, only logical inference can be drawn and no reasoning can be created where none exists. In *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, [2013] FCJ No 449 [*Komolafe*], the Court provides the following guidance:

> 11 *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what

> findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page. [Emphasis added]

[19] As in *Komolafe*, above, "there are no dots" on the pages of the IAD decision in the present matter. The decision provides no insight into the reasoning process of the member, rendering the decision unreasonable.

[20] For these reasons, the application is allowed. No question of general importance has been proposed by counsel and none is certified by the Court.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The IAD's decision is set aside, and the matter is referred back to the IAD for redetermination by a different member. No question is certified.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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