Federal Court  Cour fédérale

Date: 20160223

Docket: IMM-8340-14

Citation: 2016 FC 240

Ottawa, Ontario, February 23, 2016

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

BALVIR SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Balvir Singh (the "Applicant") seeks judicial review of a decision of the Immigration and Refugee Board, Immigration Appeal Division (the "IAD"), dated November 20, 2014. In that decision, the IAD dismissed the appeal of the Applicant from the decision of an Officer of the High Commission of Canada in New Delhi, India, refusing the sponsored application for permanent residence of his spouse. The negative decision was based upon the Officer's opinion that the marriage between the Applicant and his spouse, Gurpreet Kaur, was not genuine within

the meaning of subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR 2002-227 (the "Regulations") and was entered into for the purpose of acquiring status under the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (the "Act").

[2] The Applicant is a Sikh and a citizen of India, from the Punjab region. He came to Canada in May 2001 and made a refugee claim. He first married in August 2002. Upon sponsorship of his wife, he attained permanent residence status in May 2006. Two children were the issue of that marriage, prior to the separation of the Applicant from his first wife, who had engaged in adultery. The marriage ended by a divorce in July 2010.

[3] In February 2009, his family began talking about finding a new wife for the Applicant and approached a matchmaker, who suggested pairing him with his current wife. The Applicant went to India, and met his wife and her family in February 2010. The couple agreed to the match and their families consented on the same day. An engagement ceremony was held a few days later and the Applicant returned to Canada on February 28, 2010.

[4] In November 2010, the Applicant's father died. The Applicant married his wife in India on January 28, 2011 and remained in India until May 25, 2011. A spousal sponsorship application was submitted by the Applicant on August 5, 2011.

[5] The Applicant visited India between July and September 2012. His daughter was born in India in May 2013. The Applicant returned to India for a visit for three weeks in September 2014.

[6] By letter dated May 16, 2012, the application for permanent residence of the Applicant's wife was refused, on the basis that, pursuant to subsection 4(1) of the Regulations, the Applicant's wife was not a spouse because she entered into the marriage to acquire status or privilege under the Act.

[7] The hearing before the IAD was held on October 20, 2014. In its decision dismissing the appeal, the IAD concluded that the marriage was not genuine and was entered into primarily for the purpose of acquiring status in Canada.

[8] The IAD said that the genuineness of the Applicant's prior marriage was a relevant factor in determining the genuineness of his current marriage. It found there was no credible reason why the Applicant stayed in his first marriage for as long as he did, nor why he did not confront his first wife about the paternity of his children if she was having an affair.

[9] The IAD expressed concerns about the lack of inquiry from the family of his second wife about his previous marriage, to ensure that the match with his second wife was suitable. The IAD found that the Applicant's prior attempts to acquire status were not genuine and that he was complicit in having his wife acquire status by a non-genuine marriage.

[10] The IAD noted that the existence of a child of the second marriage was insufficient to allay concerns about the marriage.

[11] The parties addressed the following issues: the applicable standard of review; whether there was a reasonable apprehension of bias because the IAD had previously ruled only once in favour of an applicant, in the 49 decisions published on CANLII; a reviewable error in finding that the wife is not a spouse; and a reviewable error in failing to consider the best interests of the child of the marriage.

[12] The issue of bias, involving a question of procedural fairness, is reviewable on the standard of correctness; see the decision in *Dang v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 1195 at paragraph 32.

[13] The finding that the wife is not a spouse, because she is not a member of the family class, is a question of mixed fact and law, and reviewable on the standard of reasonableness; see the decision in *Khosa v. Canada (Minister of Citizenship and Immigration)*, [2009] 1 SCR 339 at paragraphs 52-62. Likewise, the alleged failure to consider the best interests of the child involves a question of mixed fact and law and is reviewable on the standard of reasonableness; see the decision in *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 at paragraph 44.

[14] According to the decision in *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190 at paragraph 47, the standard of "reasonableness" requires that the reasons enable the reviewing Court to understand why the tribunal made its decision, and permit it to determine if the conclusion is within the range of possible, acceptable outcomes.

[15] I will first address the issue of bias. In this regard, the Applicant relies upon statistics as to the rate of acceptance of applications under the Act by the IAD Member where there was only one decision in favour of an applicant.

[16] I agree with the submissions of the Minister of Citizenship and Immigration (the "Respondent"), that merely providing numbers as to the acceptance rate of a particular member of the IAD does not establish bias. There is no methodology to the so-called statistics presented by the Applicant. I refer to the decision in *Es-Sayyid v. Canada (Public Safety and Emergency Preparedness)*, [2013] 4 FCR 3 at paragraph 45.

[17] I am satisfied that there is no reviewable error arising from the manner in which the IAD addressed the best interests of the child. According to the decision in *Owusu v. Canada (Minister of Citizenship and Immigration)*, [2004] 2 FCR 635, a duty to consider this issue only arises when it is sufficiently clear from the evidence that an applicant is relying on the best interests of a child, in the assessment of humanitarian considerations by the IAD. Upon reviewing the record in this case, it appears that there is insufficient evidence of reliance by the Applicant upon the best interests of the child, in the evaluation of the sponsorship application in issue.

[18] However, I am not satisfied that the IAD reasonably assessed the evidence before it about the genuineness of the Applicant's marriage with his current spouse.

[19] A review of the transcript shows a dominant focus on the circumstances of the Applicant's first marriage, without much attention to the circumstances surrounding his

engagement to his current wife and the development of their marital relationship. I acknowledge that the IAD may consider an applicant's prior immigration history; see the decision in *Khera v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 632**.**

[20] In the present case, there is merit in the Applicant's arguments that the Board may have overlooked nuances about marriage in the Sikh culture, for example relating to whether the marriage between the Applicant and his current wife would be a "suitable match", as referenced in paragraphs 26 and 29 of the decision under review.

[21] Considering the evidence in the Certified Tribunal Record, including the transcript of the hearing before the IAD, I am not satisfied that the IAD's finding as to the genuineness of the Applicant's marriage meets the standard of reasonableness as discussed above.

[22] In the result, this application for judicial review is allowed, the decision of the IAD is set aside, and the matter is remitted to a differently constituted panel of the IAD for redetermination.

[23] The Applicant is seeking costs, if successful in this application for judicial review. According to section 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, costs may be awarded in immigration judicial review proceedings where there are "special reasons" for doing so.

[24] I am not persuaded that the Applicant has demonstrated any special reasons justifying costs and no costs will be awarded.

[25] The Applicant proposed the following questions for certification:

> 1) Is the sponsor's immigration history relevant in determining whether a marriage is genuine
>
> 2) Does an officer breach the rules of procedural fairness by asking questions pertaining to the sponsor's previous marriage before examining the current marriage; i.e. that is so discombobulates the sponsor and sponsoree that it hinders their ability to answer questions with respect to the present marriage
>
> 3) Does the ruling in *Gill v. Canada* FC 122 [sic], affirming a presumption of genuineness of marriage where a child is born of the marriage, constitutes good law
>
> 4) In assessing the bona fides of a relationship, do visa officers and IAD members have an obligation to consider the best interests of a child directly affected by the determination.

[26] Considering the test for certification in the decision *Zazai v. Canada (Minister of Citizenship and Immigration)* (2004), 318 NR 365 (FCA)**,** that is, "a serious question of general importance which would be dispositive of an appeal", I am not satisfied that the proposed questions meet the test and no question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the decision of the IAD is set aside, and the matter is remitted to a differently constituted panel of the IAD for redetermination, no question for certification arising, and no costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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