Federal Court  Cour fédérale

Date: 20160614

Docket: IMM-5575-15

Citation: 2016 FC 666

Ottawa, Ontario, June 14, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

ANTON VOLODYMYR POBEREZHNYY

Respondent

JUDGMENT AND REASONS

[1] The Minister of Citizenship and Immigration is bringing an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). The government contends that the credibility findings that were made by the Immigration Appeal Division (IAD) were unreasonable. That is a high threshold to meet and, in the view of the Court, the government has not met its burden. The application will therefore be dismissed for the following reasons.

I. Facts

[2] The respondent is from the Republic of Ukraine. He met the person who was to become his wife in or around March or April 2004. She is a Canadian citizen who was vacationing in the Ukraine. They married on March 23, 2008 in Ukraine.

[3] The respondent's wife sponsored him and he was landed on March 7, 2010 as a member of the family class. Between the marriage and the respondent's landing on March 7, 2010, the respondent's wife gave birth to a child on August 7, 2009. It is not contested that the respondent is not the father of the child. What lies at the heart of the credibility issue is the allegation that the respondent had no knowledge of the child's birth until he came to Canada.

[4] It would appear that the spouses reconciled. Nonetheless, the marriage broke down six months after the respondent landed in Canada. A divorce followed. The respondent claims that the cause of the breakdown was his former wife's mental health, together with the difference between the former spouses' religious beliefs.

[5] The Minister took the view that the respondent had misrepresented himself as eligible for sponsorship under the family class. The allegation is that the marriage is not genuine. As a result, a report under paragraph 41(a) of the IRPA was issued. The paragraph reads:

40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	40 (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) for directly or indirectly	a) directement ou

misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
…	…

[6] Pursuant to subsection 44(2), the Minister referred the report to the Immigration Division (ID) for an admissibility hearing.

[7] The ID, once seized of the matter, issued a decision on January 28, 2014. The ID found against Mr. Poberezhnyy. The ID found it implausible that "something as important as "the respondent's" wife having a child that could not possibly have been his would not have been brought to [his] attention by other family members, especially [his] brother." The member found that the respondent's response to the existence of the child during his immigration interviewing was "best described as nonchalant" and was "not reflective… of someone who is emotionally invested in a genuine marriage." It was then concluded that it was "more likely than not that the [respondent] knew about the child before [he] came to Canada and it was of little or no concern to [him] as neither [he] nor [his] sponsor were in a committed relationship."

[8] The ID was also quizzical that the claimed reason for leaving the relationship could be the mental health issues of the respondent's spouse. Specifically, the member noted that the mental health concerns had not been mentioned by the respondent's former counsel in submissions or by the respondent during the immigration interview, and were further cast into

doubt by the absence of any "objective credible or trustworthy" evidence that she had any such health concerns at the time of their marriage. In essence, this added weight to the applicant's contention that the marriage had been of convenience from the outset.

II. Decision Under Review

[9] The appeal before the IAD resulted in a decision rendered on November 18, 2015. That decision overturned the ID decision. In the view of the IAD, the respondent was not a person described in subsection 40(1) of the IRPA. This is the decision that is the subject of the judicial review launched by the Minister.

[10] During the appeal before the IAD, being a *de novo* proceeding, the panel proceeded to disagree with the assessment made by the ID. Hence, the panel was satisfied with the detailed descriptions of how the respondent and his wife-to-be met, how their relationship progressed and how they finally decided to get married. In particular, the IAD found that the respondent had not been told about his future wife's mental health issues before the marriage, coming to the conclusion that this is consistent with her father's evidence that he did not wish to tell the respondent and others about it. Actually, the respondent provided a number of medical documents at the appeal stage to support his testimony that his wife was suffering from mental health issues before the marriage.

[11] While the panel found inconsistencies between some of the respondent's statements at the immigration interview and those he had made before the ID and on appeal before the IAD, the panel found it significant that the evidence presented before the two latter bodies was

fundamentally consistent and accepted the respondent's explanation for the discrepancies, which he claimed were the result of translation issues during his immigration interview. In his view, not only had the translation been done by the respondent's friend, and not a professional translator, but the officer had also not read back the respondent's answers to him in order to ensure their correctness.

[12] The most contentious issue, perhaps, was whether or not the respondent knew of the child being born only after he arrived in Canada. The IAD found his testimony to be credible noting that his wife's father indicated that he and his wife had chosen not to reveal this information to the respondent because of the fear that this would impact the marriage. Evidently, the IAD accepted the explanation.

[13] In a similar vein, the IAD took issue with the finding of the ID member who assessed the respondent's reaction to the news of his wife having a child in his absence. Rather than being "nonchalant" as found by the ID member, the IAD concluded that the respondent's demeanour appeared to be more a matter of acceptance and moving on. Ultimately, the panel found that there was insufficient evidence to conclude that the respondent did not care because his marriage to his then-wife was purely one of convenience. As a result, the IAD concluded that the respondent is not inadmissible for misrepresentation.

III. Issues

[14] In essence, the only issue before this Court is whether the IAD came to a conclusion that can be said to be unreasonable. In matters regarding credibility and plausibility, the standard of

review is that of reasonableness (*Yu v Canada (Citizenship and Immigration)*, 2016 FC 540). Accordingly, a high level of deference is to be afforded to the decision-maker.

IV. Analysis

[15] The applicant claims in this case that material evidence central to the respondent's credibility was ignored. It would follow, in the Minister's view, that the decision is unreasonable.

[16] The argument put forth by the Minister is that a letter submitted by counsel to the respondent, not the counsel currently representing the interests of the respondent, would contradict the testimony of the respondent to the effect that he did not know about the birth of the child before he came to Canada.

[17] It seems that the Minister's argument is based solely on one sentence in that letter of counsel. That letter, in and of itself, does not contradict the testimony. It reads: "Nina told Anton about the pregnancy and he accepted it and the couple reconciled. Nina's baby was born in August 2009." This sentence, once read in context, could be seen as speaking of a reconciliation having taken place in the two years between the marriage and the arrival of the respondent in Canada. However, that conclusion is not the only one that can be arrived at. Furthermore, this is not the testimony of the respondent, but rather a letter sent by counsel in February 2013. It is unclear if the sentence is meant to reflect the situation within the couple during the two years leading to the arrival of the respondent or when he arrived in Canada.

[18] The applicant would want for this one sentence to be pivotal. I do not share that view. In my estimation, the issue is at best ancillary. The fact that the IAD did not address specifically an ancillary issue does not render the decision unreasonable. In my view, the heavy reliance on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL), is not appropriate in the circumstances of this case. What may well be a more appropriate authority is that of *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at page 708 [*NL Nurses*]. At paragraph 18 of the decision, the Court cites with approval a paragraph taken from the factum of the respondents in that case:

> When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum - the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive.

[19] Here, the burden that was on the applicant was to show that the IAD's decision is not reasonable in that it does not meet the standard established by the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, as the Court found that the reviewing court "is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (paragraph 47).

[20] It is therefore possible for different outcomes to be reasonable. In this case, the ID and IAD came to diametrically different decisions. It is because the two specialized tribunals took different views of the same general evidence, with the IAD hearing the evidence of the respondent and that of his former father-in-law. In order to be successful, the applicant had to

show that the decision reached does not fall within the range of possible acceptable outcomes. It is not a matter of preferring one decision over the other. It is rather that the Crown has to satisfy the Court that the IAD decision is not reasonable. That burden has not been discharged.

[21] The reasons for the decision are, in my view, sufficient to allow the reviewing Court to understand why the decision was reached (*NL Nurses* at paragraph 16). I could not find any issue with the intelligibility of the IAD's decision. On the one hand, the ID found that the respondent lacked credibility and therefore rejected the explanations offered. On the other hand, the IAD accepted the explanations given and generally found the respondent to be credible after hearing his testimony for itself. This disagreement between the ID and the IAD on the plausibility of certain aspects of the respondent's story does not make the decision of the IAD unreasonable.

[22] In the end, the applicant's argument essentially amounts to an expression of disagreement with the IAD's ultimate assessment, preferring that of the IAD. Whether this Court would agree with one or the other is irrelevant. The only decision that must be made is whether the decision of the administrative tribunal is itself unreasonable. That is a conclusion that cannot be reached on this record. This Court will not reweigh the evidence.

[23] The applicant also claimed that there was other contradictory evidence that was not referred to by the ID. In my view, none of these carries much weight and it follows that the application for judicial review must be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no serious question of general importance.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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