Federal Court  Cour fédérale

Date: 20160719

Docket: IMM-161-16

Citation: 2016 FC 831

Ottawa, Ontario, July 19, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

KARMJEET KAUR TIWANA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board [IAD], dated December 21, 2015, dismissing the Applicant's spousal sponsorship appeal on the doctrine of *res judicata*.

II. Background

[2] The Applicant, Karmjeet Kaur Tiwana, was born in India and was granted permanent residence in Canada in 2005 under a spousal sponsorship by her former husband. Within one month of landing, the Applicant separated from her former husband and divorced him several months later.

[3] In November 2008, the Applicant first met and married her second husband in India. In June 2009, the Applicant's second spouse applied for permanent residence in Canada.

[4] After conducting an interview with the Applicant and her spouse, a visa officer [the Officer] refused the permanent residence application pursuant to subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], which provides that a person will not be considered a "spouse" under the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) [Act] where: (a) the marriage was entered primarily for the purposes of immigration; or (b) the marriage is not genuine. Though these are distinct findings, the Officer was satisfied both were met in this case. The Officer noted the following concerns:

a. the spouse's explanation why the marriage was arranged far from his village was not credible;
b. the spouse lacked knowledge of simple things about the Applicant – he could not immediately name the Applicant's parents and named them incorrectly, he provided inconsistent evidence regarding the identification of the Applicant's maternal uncle, he could not state the village of the Applicant's relatives even though he purportedly visited

them after the marriage, and he was not knowledgeable about the Applicant's employment;

c. the spouse's description of where the Applicant lives and with whom was inconsistent with the Sponsor Questionnaire; and
d. the telephone bills submitted were for the telephone of the spouse's younger paternal uncle and the mail was addressed to this same uncle, whose name was later struck out and changed to the Applicant's.

[5] The Applicant appealed this decision to the IAD, which was dismissed in April of 2012, under subsection 4(1) of the Regulations [the Previous Decision]. The IAD noted in this decision that "at the time of the February 2012 hearing, the Appellant was pregnant… [t]he panel does not have sufficient reason to doubt that the Appellant became pregnant through her relationship with the Applicant". Though the IAD noted that a pregnancy is strong presumptive proof that the claimed marital relationship is genuine (citing *Gill v Canada (Minister of Citizenship & Immigration)*, 2010 FC 122 at para 8), it nevertheless found the following facts inconsistent with a genuine ongoing marital relationship:

a. the spouse's testimony contradicted the Applicant's regarding the development of their relationship and marriage negotiations;
b. the spouse did not provide a credible explanation for why the marriage festivities were held so far away from his home;
c. the spouse demonstrated a lack of knowledge of the Applicant;

d. in attempting to explain the spouse's incorrect and inconsistent testimony, the Applicant alleged her spouse suffers from memory problems, yet provided no corroborating evidence;
e. the spouse did not provide an accurate account of when he learned of the pregnancy;
f. the Applicant had not discussed tentative plans for maternity leave or return to work with her spouse;
g. evidence of savings and insurance was of limited value, as all documents are post-refusal; and
h. the spouse has family members residing in Canada, which further suggests the marriage was entered into for immigration purposes.

[6] Justice Anne Mactavish denied leave for judicial review of this decision on October 29, 2012.

[7] In October 2013, the Applicant again applied to sponsor her spouse, which was refused on December 8, 2014, pursuant to subsection 4(1) of the Regulations. Though the Applicant and her spouse had been invited for an interview, they did not show. The Applicant appealed the refusal to the IAD, which is the decision currently under review [the Decision].

[8] The IAD dismissed the appeal on the basis of *res judicata* and issue estoppel – the legal doctrine meant to preclude continued litigation of a case that has already been finally decided on the same issues and between the same parties.

[9] The IAD noted the two-step process governing issue estoppel set out in by the Supreme Court of Canada in *Danyluk v Ainsworth Technologies Inc,* 2001 SCC 44 at paragraph 33 [*Danyluk*]: first, determine whether the pre-conditions of issue estoppel apply; and second, determine whether applying *res judicata* would result in an injustice.

[10] Having considered the evidence and the law on *res judicata*, the IAD was satisfied that the necessary preconditions set out in *Danyluk*, above, were met: (i) the same issue has been previously decided in the earlier proceeding; (ii) the Previous Decision was final; and (iii) the parties to the present proceeding are the same as the parties to which the Previous Decision applied (*Danyluk*, at para 25).

[11] At the appeal, the Applicant had argued that the doctrine of *res judicata* should not apply because there is new evidence consisting of the birth of her son, further trips to India to visit her spouse, and evidence of continuous contact between the couple.

[12] The IAD noted that the presence of decisive, fresh evidence that could not have been discovered by the exercise of reasonable diligence in the first proceeding constitutes a "special circumstance" which may serve as a valid basis for refusing to apply the doctrine of *res judicata*.

[13] Upon careful consideration of the new evidence, the IAD was not satisfied that the evidence amounted to "decisive new evidence" that is demonstrably capable of altering the result of the first proceeding.

[14] The IAD noted that though the birth of the Applicant's son in August 2012, is new evidence, the Previous Decision took into account that the Applicant was pregnant, and did not have concerns the spouse was not the father of the child. Though the best interests of the child may not have been addressed in the Previous Decision, the pregnancy was one factor considered in the overall assessment of the sponsorship appeal.

[15] Moreover, the documentary evidence was insufficient to overcome the concerns and discrepancies raised in the Previous Decision. Other than the birth of a child, the documentary evidence simply aims to show that since the Applicant and her spouse are still together, the marriage is genuine. The IAD reasoned that if such evidence were considered "decisive new evidence", these types of proceedings would lack finality, as persons described under subsection 4(1) of the Regulations would simply attempt to remain together overtime.

[16] While the birth of a child is a significant factor, it is one of many considered in determining whether the spouse falls under subsection 4(1) of the Regulations. The IAD found that alone, it does not alter the Previous Decision or overcome concerns of the most recent decision from the Officer, dated December 2014.

[17] The IAD cited *Chotai v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1335 [*Chotai*], as support for its view the evidence did not preclude the application of *res judicata,* as it did not address both factors under subsection 4(1) of the Act. In that case, quite similar to the Applicant's, Justice Michael Phelan wrote:

> 19 The Applicant's position can be summarised as follows: the new evidence (such of it as is truly new) shows that the

> relationship is real. Since it shows the continuum of a relationship said to be one of convenience, it shows that the relationship is genuine and rebuts the original decision. The thesis is that the longer a couple stays together, the more genuine the relationship.
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> 20 The issue in this case is not whether the relationship has become genuine. Section 4 of the Regulations does not speak to the state of the relationship from time to time but whether it "was entered into primarily for the purpose of acquiring any status or privilege under the Act" (emphasis added). It speaks to the state of the relationship, its purpose at the time at which it was entered. Subparagraph (b) ("is not genuine") speaks to the state of the relationship at the time it is being considered. However, the decision is grounded in subparagraph (a), not subparagraph (b).
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> 21 As such, the "fresh evidence" must be evaluated with a view to whether it is sufficient to address and materially change the original decision. This is the distinguishing feature between this case and Sami v. Canada (Minister of Citizenship & Immigration), 2012 FC 539, 215 A.C.W.S. (3d) 190 (F.C.), where the fresh evidence addressed the IAD's initial concerns.

[18] The IAD concluded that the doctrine of issue estoppel applied on these facts, as whether the Applicant's spouse is caught by subsection 4(1) of the Regulations has already been assessed by two decisions: by the IAD in the Previous Decision, and by the Federal Court, denying leave.

III. Issue

[19] The only issue in this case is whether it was reasonable for the IAD to determine that the new evidence was not decisive, such that it was capable of altering the results of the Previous Decision.

IV. Standard of Review

[20] Whether the birth of a child and evidence regarding the ongoing relationship between the Applicant and her spouse constitutes decisive new evidence capable of altering the results of the previous decision, and thus whether *res judicata* and issue estoppel ought to have been applied, is reviewed on the standard of reasonableness (*Dhaliwal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1182 at para 7 [*Dhaliwal*]; *Chotai*, above at para 16).

[21] Any issues of procedural fairness are reviewed on a standard of correctness.

V. Analysis

[22] Neither party disputes that the principle of *res judicata* arises; rather, they dispute whether it should be applied. The Applicant's position is that the IAD improperly analyzed the new evidence, finding it insufficient to alter the previous findings, which renders its Decision unreasonable.

[23] First, she submits that the reasoning applied by this Court in *Sandhu v Canada (Minister of Citizenship and Immigration)*, 2014 FC 834 [*Sandhu*], applies to the case at bar. In *Sandhu*, above, Justice Luc Martineau found that evidence of a continuing relationship, further trips to India, and the birth of a child have been held to be fresh, decisive evidence in previous judicial reviews of spousal-sponsorship applications, and that the IAD is required to address why it does not constitute such evidence beyond simply adopting the reasons of the previous panel.

[24] In this case, the Applicant claims that the IAD simply adopted previous findings and failed to provide any analysis explaining why those findings are not overcome by this evidence.

[25] Second, the Applicant argues that the IAD gave insufficient consideration to the birth of a child, which has been affirmed by this Court to be an example of special circumstances and significant new evidence warranting the non-application of issue estoppel. The IAD merely acknowledged the existence of a child, but did not assess relevant facts, including that the Applicant and her husband have jointly parented their child for over three years.

[26] Third, the Applicant submits that the IAD erred by disregarding evidence of the Applicant and her spouse's ongoing commitment, which demonstrates a genuine marriage that has been tested over time and through the adversity of separation.

[27] The Applicant also claims that in its reasons, the IAD erroneously found that evidence of an ongoing and committed relationship cannot be used as proof of the genuineness of the marriage and to support the fact it was not entered into for the primary purpose of immigration. The Decision states:

> If this were to be allowed, then persons who are described pursuant to subsection 4(1) of the Regulations would just attempt to remain together overtime with a view of showing that subsection 4(1) of the Regulations does not apply; doing so would render cases in this profile as indefinite not bringing finality.

[28] According to the Applicant, this reasoning is flawed and runs contrary to this Court's jurisprudence. Evidence of a continuing long-term relationship has been found to be an indicator that the relationship is genuine, and is capable of altering the original panel's finding that the

marriage had primarily been entered into for immigration purposes (*Sami v Canada (Minister of Citizenship & Immigration)*, 2012 FC 539 at paras 72-79 [*Sami*]; *Sandhu*, at paras 13, 16).

[29] Finally, while the IAD could have assessed the evidence and found it did not overcome the original determination, the Applicant claims it was not open to the IAD to refuse to consider the evidence at all.

[30] In my view, the IAD correctly applied the preconditions to issue estoppel and reasonably concluded *res judicata* was applicable in the circumstances. The IAD assessed whether the evidence was sufficient to alter the Previous Decision, and reasonably determined it did not.

[31] The IAD did not simply affirm previous findings. Rather, the IAD "carefully considered" the evidence, and found it was not decisive new evidence sufficient to overcome the Officer's concerns. The new evidence consisted primarily of the birth of the Applicant's son, and evidence relating to the Applicant's fourth and fifth trips to India in 2013 and 2015 (i.e. passport stamps, and few photos of the family together). The IAD reasoned that the pregnancy had in fact been taken into account by the IAD previously, but that it had not influenced its ultimate conclusion under subsection 4(1). Further, the IAD did not find the other evidence capable of altering the Previous Decision, as it failed to address the former evidentiary discrepancies and credibility issues that suggested the marriage was entered into for immigration purposes and was not genuine.

[32] Though the type of evidence presented by the Applicant has before been held to constitute fresh, decisive evidence, each case is unique and must be decided on its particular facts. As Justice Catherine Kane held in *Ping v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1121 at paragraph 24 [*Ping*], "it is not the nature of the evidence that is determinative but how that evidence addresses or overcomes the earlier findings". Though the Applicant relies heavily on *Sandhu* to suggest the type of evidence she currently presents is decisive new evidence, as stated by Justice Martineau at paragraph 15 of that decision:

> 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.
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> [Emphasis added]

[33] It should be noted that both the Officer and the IAD in its Previous Decision found serious problems with Applicant and her spouse's inconsistent testimony, lack of knowledge of each other, their credibility, and the *bona fide* nature of their marriage. This led the IAD to conclude that *both* subsection 4(1) factors had been met. While the type of evidence adduced by the Applicant has been held to be fresh, decisive evidence in previous judicial reviews of spousal-sponsorship applications, I also note that equally so has it been found not to be (*Anttal v Canada (Minister of Citizenship & Immigration)*, 2008 FC 30 at para 19; *Ping*, above, at para 29). The analysis is contextual and fact-dependant.

[34] For instance, in *Sandhu*, unlike the case before me, the applicant was not pregnant at the time the first IAD appeal was dismissed. Thus, that fact was "new evidence" not considered by the IAD in the first decision that was found to change the previous analysis.

[35] In the present Decision, the IAD stated that evidence of a continuing relationship cannot be new evidence capable of altering the first decision. Although this finding runs contrary to decisions of this Court, I do not find this error was determinative, or that it affected the overall reasonableness of the Decision. This is because the IAD considered the alternative, and did not simply ignore the documentary evidence of a continuing relationship. At paragraph 16, the IAD stated:

> Even if the Panel did determine the documentation to be new evidence demonstrably capable of altering the decision of the first appeal, which it does not, the documentary evidence has not been able to overcome the concerns and discrepancies addressed in the decision of Member N.S. Paul of April 24, 2012.

[36] Moreover, though occurrences subsequent to a marriage may be relevant to an assessment under subsection 4(1) of the Regulations, as Chief Justice Paul Crampton held in *Gill v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1522 at paragraphs 32 and 33:

> 32 … such evidence is not necessarily determinative, and it is not necessarily unreasonable for the IAD to fail to explicitly consider and discuss such evidence.
>
> 33 This is because, 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 "<u>was</u> 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.

[37] In the case at hand, evidence of occurrences post-dating the marriage does not speak to the nature of the marriage at the time it was entered into (*Chotai*, at para 21), and it was not unreasonable for the IAD to find that evidence was unable to overcome concerns and discrepancies noted in the Previous Decision.

[38] As well, the Applicant's assertion that the IAD's refusal to provide the Applicant an opportunity to present *viva voce* testimony was unreasonable and procedurally unfair is without merit. *Res judicata* is a pre-hearing matter that, if applied, precludes a full hearing. The IAD has the authority to summarily dismiss an appeal, without a full hearing on the merits, when an appellant seeks to re-litigate on essentially the same evidence (*Kaloti v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FCR 390 (FCA) at paras 9, 10 [*Kaloti*]; *Hamid v Canada (Minister of Citizenship & Immigration)*, 2007 FC 220 at para 18). As well, the Applicant and her spouse have had the opportunity to present *viva voce* testimony in the first instance, which led to the IAD concluding as it did, in particular due to discrepancies, credibility issues and other testimony that the IAD found inconsistent with a genuine marriage that was not entered into for immigration purposes.

[39] Furthermore, while the Applicant criticizes the Decision for failing to analyse the best interests of the child, under sections 63 and 65 of the Act, the IAD does not have jurisdiction to consider humanitarian and compassionate considerations arising on an appeal from a family class application. The IAD may only allow the appeal based on sufficient humanitarian and compassionate grounds (thereby taking into account the child's best interests) once it has decided that the foreign national is a member of the family class and that their sponsor is a "sponsor"

within the meaning of the Regulations (*Canada (Minister of Citizenship and Immigration) v Chen*, 2014 FC 262 at para 14; *Fang v Canada (Minister of Citizenship and Immigration)*, 2014 FC 733 at paras 23-34). Given the preliminary and threshold finding of *res judicata*, the Applicant's spouse is not a member of the family class.

[40] I also find that the reasons provided are sufficient: the IAD explained why the doctrine of *res judicata* applied and why there was inadequate evidence to overcome the Previous Decision. A decision-maker is not required to make an explicit finding on each argument and constituent element, however subordinate, leading to its final conclusion.

[41] The IAD's assessment of the new evidence was reasonable. The IAD considered both the child's birth and the limited documentation of an ongoing relationship, but found neither sufficient to offset the factors weighing against the Applicant. The IAD also reasonably found there was no evidence of unfairness or injustice so as to warrant exception to the doctrine of *res judicata* and issue estoppel, which apply to promote finality and prevent the re-litigation of issues already determined. Accordingly, I would dismiss the application.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Aris Daghighian	FOR THE APPLICANT
Hillary Adams	FOR THE RESPONDENT

SOLICITORS OF RECORD:

GREEN AND SPIEGEL LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT