Federal Court  Cour fédérale

Date: 20161013

Docket: IMM-849-15

Citation: 2016 FC 1141

Ottawa, Ontario, October 13, 2016

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

MICHELLE KIM

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant, Michelle Kim [Ms. Kim], challenges a February 10, 2015 decision of the Immigration Appeal Division of the Immigration and Refugee Board [the IAD], which decided that Ms. Kim and her husband were engaged in a non-genuine marriage for the purpose of acquiring immigration status under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

II. Issues

[2] Ms. Kim says that the decision should be sent back because of the following issues:

A. The IAD breached procedural fairness by repeatedly interrupting counsel's explanations in chief, effectively depriving Ms. Kim of the opportunity to fully present her case.

B. The decision under review is unreasonable.

[3] For the reasons that follow, I find the decision of the IAD reasonable and procedurally fair. The application is therefore dismissed.

III. Factual Background

[4] Ms. Kim is a citizen of Canada. She married Sopheak Sok [Mr. Sok], a Cambodian citizen, on January 20, 2009, in Cambodia. This marriage was Ms. Kim's second marriage and Mr. Sok's first. Ms. Kim also has a son from a third relationship.

[5] In June 2009, Mr. Sok applied for permanent residence in Canada as a member of the family class under the sponsorship of Ms. Kim. Mr. Sok was interviewed by an Immigration Officer [the officer] at the High Commission of Canada in Phnom Penh, Cambodia, on June 4, 2010.

[6] In a decision dated June 15, 2010, Mr. Sok's application was rejected. The officer was not satisfied that the marriage between Ms. Kim and Mr. Sok was genuine and believed that the

primary purpose of the marriage was for Mr. Sok to gain admission to Canada. As a result, the officer concluded that Mr. Sok did not meet the requirements of section 12(1) of the Act. Ms. Kim filed an appeal of the decision with the IAD on July 2, 2010.

[7] Hearings were held on May 17, 2013, October 8, 2013, June 25, 2014, and December 22, 2014. In a decision dated February 10, 2015, the IAD dismissed the appeal.

[8] The IAD considered the matter *de novo*, with both Mr. Sok and Ms. Kim testifying at various points of the hearing. Counsel for Ms. Kim attended the first hearing in person and the remaining by videoconference. Mr. Sok testified by telephone. A translator was present at all four hearings.

IV. Standard of Review

[9] The applicable standard of review is correctness for the procedural fairness issue and reasonableness for determinations of fact and mixed fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 (*Dunsmuir*)). In *Canada v Khosa*, 2009 SCC 12 (*Khosa*), the Supreme Court of Canada explained that the IAD deserves a high degree of deference as they have the advantage of conducting the hearings as well as reviewing the evidence directly.

V. Analysis

A. *Procedural Fairness*

[10] Ms. Kim asks this Court to grant the judicial review because the IAD breached her procedural fairness. She argues that this is due to repeated interruptions of her counsel during the course of his examination. The effect of these interruptions, Ms. Kim submits, deprived her of a fair hearing. I do not find that Ms. Kim was denied procedural fairness as the types of questions asked were appropriate and counsel had ample opportunity to present their case.

[11] The principles governing when it may be appropriate to interject during a party's questioning were established in *Yusuf v Canada (Minister of Employment and Immigration)*, (1992) 1 FC 629 (FCA). This Court has found that a panel is entitled and well advised to ask questions to ensure comprehension, especially when confusing evidence is given (*Kofitse v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 894 at para 7; *Quiroa et al v Canada (Minister of Citizenship and Immigration)*, 2005 FC 271 at para 13).

[12] Ms. Kim cites *Guermache v Canada (Minister of Citizenship and Immigration)*, 2004 FC 870 [*Guermache*], where Justice Luc Martineau considered a decision of the refugee protection division in which the panel-member repeatedly interrupted counsel's examination of witnesses. Justice Martineau confirmed that the panel can ask clarifying questions but if there was to be cross examination by a panel member, it should be after the claimant's testimony. If there is a lapse by counsel in asking a question, then the member must ask it.

[13] Unlike in *Guermache*, above, I find Ms. Kim was able to present her case. The hearing took place over several days allowing her ample time to make submissions. Two of the four hearing days were for Ms. Kim to give her evidence. At the end of the first day, counsel for Ms. Kim even remarked that he was "enjoying himself." It was only at the start of the second day that he brought up the interruptions after having time to read the transcript. I find that the interruptions on the record are closer to questions for clarification than cross-examination and therefore did not breach procedural fairness.

[14] Furthermore, this Court has established that "energetic" questioning of a witness does not constitute grounds for a finding of reasonable apprehension of bias (*Mahendran v Canada (Minister of Employment and Immigration)* (1991), 14 Imm LR (2d) 30 (FCA); *Tchiegang v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 249 at paras 17-19). At no time was the IAD member asked to recuse himself because of an appearance of bias. Therefore, I do not find that the hearing was bias nor did it have an appearance of bias.

[15] The transcript is certainly awkward at points. However, this is the reality of IAD hearings where translators, teleconference, and videoconference are involved. An awkward hearing does not meet the test for procedural unfairness.

B. *Reasonableness*

[16] Ms. Kim states that the IAD's decision is not supported by the evidence or the panel's own findings of fact making it unreasonable. Specifically, she argues that the IAD's decision is attributable to four findings that are specious in nature:

> [13] … The panel also finds it strange that the appellant, after having married a man who turned out to be violent and after having had a child with a man who turned out to be a deadbeat, would agree to marry a man and to let him become the *de facto* father of her only child, without first meeting him in person and seeing how he would interact with the child. The panel realizes that they had agreed not to make a final decision on getting married until they first met in person and the parents could meet the future spouse of their respective child but it is clear that they had every intention of marrying before meeting each other in person. Everything was rushed. From the day the appellant arrived in Cambodia until the marriage less than a month elapsed.
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> [14] The panel finds it fanciful that a twenty-six-year-old man, who appears to never have been previously in a serious relationship with a woman, would fall in love with a woman he never met in person and commit to marrying her. The panel again notes that he has not seen his wife since March 8, 2009…The panel does not find the main reason given by the appellant and the applicant for their absence of physical contact to be compelling.
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> [15] …the fundamental basis of the relationship is not believable.

[17] Ms. Kim goes on to argue that the IAD did not make an adverse finding of credibility with respect to the testimony of either Mr. Sok or her. She submits that their evidence must be presumed to be true and that the IAD must fully explain adverse inferences. Since the IAD makes no criticism of the evidence presented and finds no inconsistencies, its findings are speculative and defy analysis.

[18] Contrary to Ms. Kim's arguments, the IAD did make specific negative credibility findings with reasons. She may not agree with the findings but that does not alter the quality of the reasons. The following are a few of those reasons.

[19] The visa officer found it was unusual in Cambodia for a single, never married male to marry an older divorcee with a child from a previous relationship. The IAD considered the special knowledge of culture and customs that an overseas visa officer possesses. It balanced this view with the fact that Ms. Kim's first marriage was of short duration and that she is only older than Mr. Sok by a matter of months.

[20] The IAD expressed further concern about Ms. Kim's indifference – given the violence in her previous relationship – at entering into a relationship with a man that would become her child's father without first having him interact with her child. The marriage is rushed even though Ms. Kim initially required that they meet in person before finalizing the decision to marry. The marriage occurred within less than one month of actually meeting each other. Ms. Kim's original return ticket to Canada was February 6, 2009, but then both her and her brother had to remain in Cambodia until March 8, 2009, to register their respective marriages.

[21] The IAD was also concerned that a 26 year old man who had no previous relationships would fall in love and commit to a marriage without first meeting his potential bride. Particular significance was placed on the fact that Mr. Sok had not seen his wife since March 8, 2009. The IAD found that the husband would want to see his wife physically at least once in 5 years. This is despite Ms. Kim's explanation that she runs a business, wants her son to do speech exercises and

does not want to bring him to Cambodia because he became ill on a previous visit. The IAD found that Ms. Kim's explanation was not credible as she could have found a way to close her beauty shop and do her son's daily 20 minute speech exercises either from Cambodia or hire someone to care for her son for a short period of time in order to have an intimate relationship.

[22] Even though there was proof of telephone calls from the respective houses of Mr. Sok and Ms. Kim, there was no proof that the parties themselves were speaking or if the calls were between other members of the families with whom they resided. Again, the IAD balanced this view by not drawing a negative inference from the fact that the parties lived with their respective parents.

[23] I do not agree with Ms. Kim that the IAD speculated. She alone has the onus of proving her marriage was genuine and failed to do so. The IAD can only be asked to make findings of fact on the material provided (*Dang v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1090 at para 12). The IAD made findings on the evidence presented to them. If Ms. Kim failed to produce sufficient evidence to prove her case, the IAD cannot be expected to fill in the blanks.

[24] These are all conclusions the IAD reached having the benefit of oral hearings and the specialized knowledge of a foreign visa officer. I should not interfere with the plausibility findings of the IAD unless I am satisfied that the panel based its conclusions on irrelevant considerations or ignored evidence (*Singh v Minister of Citizenship and Immigration*, 2011 FC

1370; *Grewal v Canada (Minister of Citizenship and Immigration)*, 2003 FC 960). Whether a marriage is *bona fide*, is a pure question of fact, and owed a high level of deference.

[25] I will not re-weigh the evidence as Ms. Kim requests. The IAD heard evidence over the course of four days. Because these determinations require an assessment of credibility, the IAD was in a better position than me to make findings and deference should be given.

[26] The IAD did not ignore evidence or come to an unreasonable conclusion. Reasonableness requires that the decision must exhibit justification, transparency and intelligibility and must be within the range of possible, acceptable outcomes, defensible in fact and law (*Dunsmuir*, above; *Khosa*, above). When the totality of the decision is examined I find the decision to be reasonable and dismiss the judicial review.

[27] No question for certification was presented and none arose from the evidence.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed;

2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-849-15
STYLE OF CAUSE:	MICHELLE KIM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 22, 2016
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	OCTOBER 13, 2016

APPEARANCES:

Mohsen Seddigh	FOR THE APPLICANT
Judy Michaely	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cecil Rotenberg Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT