Federal Court  Cour fédérale

Date: 20161219

Docket: IMM-968-16

Citation: 2016 FC 1391

Ottawa, Ontario, December 19, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MOHAMMAD UMAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a matter of sponsorship in respect of marriage. The issue is one of sufficiency of evidence to ensure, not only that the marriage is genuine, but, that it is monogamous.

II. Nature of the Matter

[2] This is an application for judicial review by the Applicant pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by the Immigration Appeal Division [IAD] dated February 19, 2016, which dismissed the Applicant's appeal relating to the refusal of the application for permanent residence as a member of the family class on the basis of application of the *res judicata* doctrine.

III. Facts

[3] The Applicant, born in Ghana in 1962, is a citizen of Canada. He is the sponsor in the application for permanent residence as a member of the family class made by his spouse, a citizen of Ghana born in 1981.

[4] The Applicant alleges following. He was married to a first spouse on February 4, 1990. They separated in 2000 and divorced in Ghana on June 17, 2003. The notice of divorce was registered on August 17, 2007.

[5] The Applicant met his second spouse over the phone on November 30, 2003. They were engaged on February 14 or April 14, 2004. They first met on January 24, 2005. They were married in Ghana on February 27, 2005.

[6] The Applicant first tried to sponsor his spouse for permanent residence in 2008. A Visa Officer refused the sponsorship application on April 28, 2009, on the following grounds:

> Based on your interview at our office and a review of the documentation submitted, I am not satisfied that your relationship with your sponsor is genuine. In addition, I am not satisfied that your marriage is valid. You provided a divorce certificate between your sponsor and his previous spouse which was issued after the current marriage certificate. You have also provided statutory declarations in support of your sponsor's divorce and your current marriage which was declared and signed by deceased persons. I am not satisfied that these statutory declarations are valid. You were advised of the concerns during your interviews, but you were unable to convince me that they were unfounded. I am therefore not satisfied that your relationship was not entered into for the purpose of gaining entry to Canada. As a result, for the purpose of the regulations, you are not considered to be a member of the family class.

[7] The Applicant appealed the refusal before the IAD pursuant to subsection 63(1) of the IRPA and was heard on May 31, 2011. The appeal was dismissed by the IAD and the Visa Officer's decision was upheld on July 14, 2011. The Applicant did not seek judicial review of this decision before the Federal Court.

[8] The Applicant filed a second sponsorship for his spouse's permanent residence application. A second Visa Officer refused the sponsorship on February 24, 2014, on the following grounds:

> Based on a review of the documentation submitted, I am not satisfied that your relationship was not entered into for the purpose of gaining entry to Canada and I am not satisfied your relationship with your sponsor is genuine… As a result, for the purpose of the Regulations, you are not considered to be a member of the family class.

[9] The Applicant again appealed the refusal of his spouse's application for permanent residence as a member of the family class before the IAD on March 20, 2014.

IV. Decision

[10] On July 21, 2014, the IAD sent an early review letter to the parties and asked for submissions regarding the application for *res judicata* to the second appeal by the Applicant.

[11] On February 11, 2016, the IAD dismissed the appeal.

[12] The IAD found that *res judicata* did apply to the appeal, as the three preconditions were met. The Applicant had simply filed another sponsorship application, rather than asking for judicial review of the first IAD decision in 2011 or seeking a valid divorce from his first spouse and remarrying his second spouse. His second application for sponsorship did not overcome the earlier findings of the 2011 IAD decision and was again refused by a second Visa Officer in 2014.

[13] The IAD found that the Applicant did not produce new evidence that could be considered as constituting special circumstances capable of overriding *res judicata*; the Applicant did not address the *res judicata* issue, rather producing new evidence to show that his relationship was genuine. Consequently, the IAD decided there were no circumstances warranting the panel's discretion not to give effect to the *res judicata* principle.

V. Submissions of the Parties

[14] The Applicant claims that the IAD rejected the validity of his marriage without regard to the new evidence produced. He argues that the IAD decision was profoundly discriminatory, that

it violates the right to family life and the right to equality, and that it is based on erroneous conclusions of fact without any regard to the evidence before the immigration agent. Finally, the Applicant argues that the IAD erred in applying the *res judicata* principle. Its application took place at the expense of justice and was applied mechanically, since the IAD did not take into account the entirety of the circumstances.

[15] The Defendant argues that the IAD decision was reasonable, since no decisive new evidence was produced that could not have been adduced during the first proceedings with reasonable diligence. The Applicant has produced new versions of documents previously submitted to the IAD and a legal opinion although they could have been presented to the first panel with reasonable diligence.

VI. Issues

[16] This matter raises the following issue: Did the IAD err in its finding that the *res judicata* ought to be applied?

[17] This issue should be reviewed on a standard of reasonableness (*Chotai v Canada (Citizenship and Immigration)*, 2015 FC 1335 at para 16).

VII. Analysis

[18] The IAD determined that the three preconditions of *res judicata*, as established by the Supreme Court of Canada, were met in the Applicant's case:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.
>
> (*Danyluk v Ainsworth Techonologies Inc.*, [2001] 2 SCR 460, 2001 SCC 44 at para 25)

[19] In his memorandum the Applicant does not argue that these criteria were not met. Rather, he claims that the doctrine of *res judicata* should not have been applied, considering the circumstances of the case.

[20] It is of constant jurisprudence that the doctrine of *res judicata* must not be applied automatically:

> … The decision-maker must then apply the doctrine of *res judicata* unless some special or particular circumstances warrant hearing the matter on the merits. In determining whether such circumstances exist, it is necessary to ask whether, taking into account all of the circumstances, application of the principle of *res judicata* would work an injustice (*Apotex Inc. v. Merck & Co.* (C.A.), *Danyluk*). [The Court's emphasis]
>
> (*Mohammed v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1442 at para 12)

[21] In the case before this Court, no special or particular circumstances warranted that the IAD would hear the matter on the merits.

[22] In the Applicant's first sponsorship application, the Visa Officer and the IAD referred to the following irregularities as understood on the officer's examination: a divorce certificate between the Applicant and his previous spouse was issued after his current marriage certificate and statutory declarations in support of the Applicant's divorce and his current marriage were declared and signed by deceased persons.

[23] In his second sponsorship application, the Applicant submitted a new version of the same documents, but removed the discrepancies that had been remarked upon by the first Visa Officer in 2009 and by the first IAD panel in 2011.

[24] The Court finds it was reasonable for the IAD to determine that *res judicata* ought to apply in this case, since the Applicant produced new evidence mostly showing that his relationship to his spouse was genuine, but not that it is monogamous, and that no special or particular circumstances warranted that the IAD would hear the matter on the merits.

VIII. Conclusion

[25] The application for judicial review is dismissed.

JUDGMENT

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

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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