Federal Court  Cour fédérale

Date: 20171106

Docket: IMM-2197-17

Citation: 2017 FC 1004

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, November 6, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

MERILIA MOISE

Respondent

JUDGMENT AND REASONS

[1] In this case, the Minister of Citizenship and Immigration is seeking a judicial review of a decision rendered by the Immigration Appeal Division (IAD) on May 4, 2017. The application for judicial review is made under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The decision under review was rendered under subsection 63(1) of the IRPA, in which Ms. Moise appealed a decision by the Immigration Division. It is a case of sponsorship in the family class in which the IAD found that the respondent's marriage was genuine and was not entered into primarily for the purpose of acquiring a status or privilege under the IRPA. In doing so, the IAD set aside the decision rendered by an immigration officer in February 2013. The Minister considers that decision by the IAD to be unreasonable and is thus seeking to have it set aside by judicial review. In the Minister's view, the reasons cited by the panel are said to be problematic and unintelligible, to the extent that it is not possible to understand why the appeal was allowed in light of the evidence presented.

I. The IAD's decision

[3] In a relatively short decision, the IAD indicates that [TRANSLATION] "a mystery remains regarding the development of her relationship with her spouse" (at paragraph 3). The decision-maker notes the varying statements by the respondent's husband and the lack of documentary evidence regarding the existence of a relationship between the two spouses prior to their marriage. Despite that, the respondent received a favourable decision.

[4] The respondent is in her mid-50s and originally from Haiti. She has been a permanent resident of Canada since 1992. She has been married twice previously and is the mother of five children, four of whom are still living. She had sponsored her first husband, but a divorce was granted a short time later in 1994. She married her second husband in November 1994 and then sponsored him. That marriage ended four years later, but the divorce was only finalized in

January 2001. Her current spouse is 47 years old and also from Haiti, where he still lives. He was married once before and seems to have had other relationships.

[5] The evidence accepted is that the two spouses met by chance in 2004. However, the two spouses' versions differ after that. The respondent claimed that she had spoken to her future spouse and that they then shared a meal. During that visit to Haiti, she allegedly saw him again two or three times and they exchanged telephone numbers. According to the respondent, she told her future husband that she was visiting Haiti, but lived in Canada. That is not exactly what the husband stated when he testified before the IAD. He instead stated [TRANSLATION] "that he had barely spoken to the woman who would become his spouse during the three days that he was working at her sister's house. He supposedly gave her his telephone number, but did not find out that she was living in Canada until she contacted him again a few weeks later, when she was back in Montréal" (at paragraph 11). In fact, according to the IAD, the husband insisted that during the first interactions with the respondent, he did not know that she lived in Canada. The IAD states that it did not believe this.

[6] In any event, the spouses were married in Haiti on July 3, 2011. It was the first time since their initial meeting in 2004 that they had seen each other in person.

[7] What is apparent from the decision is that the respondent apparently had considerable interest in the man she would marry in 2011, but to her great displeasure, her future spouse was already married and had met another person in 2006, who gave birth to a child who the IAD believes is the daughter of that husband. Paragraph 17 of the decision reads as follows:

> [TRANSLATION]
> 17. I actually believe that the appellant's spouse is the biological father of the girl born in 2006, which is why he declared his paternity to the Haitian authorities. I am of the opinion that he wanted to minimize the existence of this other woman in his life.

[8] According to the evidence, this second woman died in the devastating earthquake that struck Haiti in January 2010. However, the future husband still needed to divorce his first wife. That was done in May 2010.

[9] Pursuing its analysis, the IAD notes that three different versions were given regarding the timing of the marriage proposal. Documents seem to indicate that it happened in 2007, although the respondent stated that the proposal took place in 2010, after the earthquake. Her spouse testified that it was in 2009. The IAD dismisses the inconsistencies and contradictions as follows:

> [TRANSLATION]
> 22. I do not draw any negative inference from the contradictions and inconsistencies in the testimony of the appellant's spouse. I believe that they are due to the fact that he tried to show his role in this story in a better light, considering that, at times, he was courting more than one woman. I believe that these are his reasons for minimizing his interactions with the appellant in 2004, for trying to deny the extent of his relationship with the second woman by claiming that the child born in 2006 was not his, and this is why he became bogged down by the dates of the marriage proposal.

[10] Moreover, the IAD states that it is aware that the burden of proof lies with Ms. Moise and that she must normally bear the brunt of the contradictions revealed in the testimonies. The IAD even states that [TRANSLATION] "[w]hen faced with numerous inconsistencies, I am usually

obliged to conclude that the genuineness of the marriage and of the purposes of the marriage have not been demonstrated" (at paragraph 26).

[11] Hence, despite that recognition, the IAD decides to give sufficient weight for the burden to be discharged. However, the Minister argues that there is no valid explanation for reaching such a conclusion. In fact, the only explanation given by the IAD is in paragraph 27 of the decision, which reads as follows:

> [TRANSLATION]
> 27. However, this situation is different in that I believe enough from the testimonies to conclude that the appellant has discharged her burden of proof, on a balance of probabilities. I am of the opinion that the appellant and her spouse met in 2004; they had a long-distance relationship; and they eventually had a romantic relationship, which led them to marry in July 2011.

[12] Seeking to bolster that conclusion without real reasons, the IAD notes that the respondent went to Haiti in 2012, 2013, 2015, and 2016, and that she stayed with her spouse during each of those visits. According to the IAD, that is an argument for recognition of the genuineness of their union, and that the marriage was not entered into primarily for the purpose of facilitating immigration to Canada.

II. The applicable provision

[13] Subsection 4(1) of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) [Regulations] applies in this case. That subsection defines what constitutes a marriage or common-law relationship for the purposes of sponsorship in the family class. The provision reads as follows:

Bad faith	**Mauvaise foi**
4 (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership	**4 (1)** Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :
(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or	**a)** visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;
(b) is not genuine.	**b)** n'est pas authentique.

[14] Thus, that is the entire issue. Was the marriage in 2011 entered into to allow for a sponsorship following the earthquake that struck Haiti or is it genuine? The short text in paragraphs (*a*) and (*b*) reveals much more than its length would suggest.

[15] The burden on the respondent is to demonstrate, on a balance of probabilities, that her marriage is genuine and that it was not entered into primarily for the purpose of acquiring a status. Indeed, a marriage is disqualified if either of the conditions set out in paragraphs 4(1)(*a*) and (*b*) is not met (*Mahabir v. Canada (Citizenship and Immigration)*, 2015 FC 546 and *Singh v. Canada (Citizenship and Immigration)*, 2014 FC 1077). In other words, the respondent must meet both conditions. A marriage entered into for the purpose of acquiring a status or privilege will be flawed even if it subsequently becomes genuine. As well, a marriage that is validly entered into can become flawed for immigration purposes if it loses its genuineness.

[16] On its face, the provision sets forth two different times when evaluations must be conducted. Regarding the genuineness of the marriage, the Regulations use the present tense, meaning that the genuineness of the marriage is evaluated at the time of the decision. On the other hand, the evaluation of the intent with which the marriage was entered into, i.e. primarily to acquire a status or a privilege, is in the past. The English reads "was entered" while the French reads "visait"; the evaluation is therefore conducted at the time of the marriage.

III. Standard of review

[17] The parties agree, as does the Court, that the issue of the quality of a marriage for sponsorship purposes is a question of mixed fact and law that raises the reasonableness standard. The applicant is not wrong in asserting that the issue of the quality of the motivation comes into play in assessing the reasonableness of the decision (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; [2011] 3 SCR 708 [*Newfoundland and Labrador*], at paragraph 14):

> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

[18] Indeed, *Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 SCR 190 [*Dunsmuir*] establishes that the reviewing court seeks the qualities of reasonableness that are justification, intelligibility, and transparency (see also *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55 [*Association of Justice Counsel*], at paragraph 40). These grounds are examined with regard to the outcome of the administrative tribunal.

IV. Analysis

[19] Essentially, the applicant argues that the IAD chose to try to explain the contradictions and inconsistencies based on something that was not before the IAD. Indeed, at best, the IAD explained it all by stating that the applicant for sponsorship apparently tried to look better when he had never expressed any embarrassment or discomfort. Furthermore, the IAD did not confront him regarding this impression to verify its merits.

[20] The Minister suggests that there is also a lack of evidence of a relationship between 2004 and 2011. Indeed the IAD is accused of brushing off an admission by the respondent at the hearing that she had wanted to help the applicant for sponsorship, a family friend, and his children, by marrying him and sponsoring him so they could have a better life in Canada. It seems that the respondent conceded that aspect but also indicated that she loved her future spouse (IAD reasons, at paragraph 24).

[21] The second part of the applicant’s argument is the lack of grounds to help understand the IAD’s reasoning to assess its reasonableness. As indicated earlier, the only explanation is in

paragraph 27 of the decision. However, that paragraph is not an explanation, but is more a simple assertion.

[22] As for the respondent, she insists on the decision-maker's discretion regarding the weight to be given to testimonies despite the contradictions that were noted. In her opinion, the Court must show deference and there is no reason to intervene.

[23] What seems troubling to me in this case is the fact that the administrative decision-maker noted contradictions and inconsistencies that are not minor. To try to explain them or maybe resolve them, the IAD relied on an explanation that was not provided by anyone, that the future husband wanted to minimize the existence of a second woman with whom he had a child and that he tried to show his role in this story in a better light, since, at times, he was courting more than one woman. That explanation was not drawn from the evidence, and seems instead to stem from the IAD's belief that things do not always follow a straight path (IAD reasons, at paragraph 25). In my opinion, that is merely speculation.

[24] When the explanations are not based on the evidence and it is hard to understand how so many contradictions and inconsistencies could allow for positive conclusions, we must fear that we are lapsing into arbitrariness, which is, of course, the opposite of reasonableness. A reviewing court must seek to find justification, transparency, and intelligibility in the reasons (*Dunsmuir*, at paragraph 47). Here, as I see it, the applicant is not seeking so much to show that the marriage is not genuine as to show that, when it was entered into, it was for an illegal purpose under subsection 4(1) of the Regulations.

[25] Of course, it must be agreed that, in such cases, the IAD has considerable discretion. On the other hand, a reviewing court cannot abdicate its duty to review the legality of a decision by an administrative tribunal. As stated by Justice Côté, dissenting, the deference required by the reasonableness standard "does not mean that an adjudicator's decision is totally immune from judicial review; the decision must be 'reasonable'" (*Association of Justice Counsel*, at paragraph 64).

[26] One of the qualities of reasonableness, of course, is that the reasons provide justification, that they are transparent and intelligible. That said, with respect, without an articulation of the reasons why the inconsistencies and contradictions were set aside, I fail to see how those qualities are met in this case. As noted by the Supreme Court of Canada in *Newfoundland and Labrador*, "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met" (at paragraph 16). However, in this case, the only reasons for resolving the difficulty presented by the contradictions and inconsistencies stem from what is not on record regarding the husband's motivation to testify as he did. Although that motivation to want to be seen in a "better light" could possibly justify the contradictions and inconsistencies, that must be seen in the evidence. No such indication is given.

[27] The IAD noted a series of inconsistencies and contradictions, recognized that the burden was on the respondent, who was the one appealing to the IAD, and admitted that [TRANSLATION] "I am usually obliged to conclude that the genuineness and the purposes of the marriage have not been demonstrated" (at paragraph 26). If the IAD is to stray from that conclusion, which it

acknowledges, reasons must be given to explain the complete reversal. However, the only articulation is in paragraph 27, cited at paragraph 11 of these reasons. Based on the evidence, it is impossible to understand how those statements are justified. There is no justification, transparency, or intelligibility. In my opinion, there is only an assertion that does not resolve the inconsistencies and other incongruities.

[28] The fact that the respondent stayed in Haiti and lived with her husband (in 2012, 2013, 2015, and 2016) does not, in my opinion, confirm that the marriage was not entered into primarily to acquire an immigration status or privilege. Such evidence could suggest genuineness, as it is tied to the present; the marriage must be authentic when the application is processed. However, a genuine marriage now does not mean a marriage that was not entered into primarily ([TRANSLATION] "visait principalement") to acquire a status or privilege. Evidence that tends to establish the present genuineness of a marriage cannot, by itself, establish that the marriage was not for immigration purposes, particularly as the IAD also concluded that [TRANSLATION] "a mystery remains regarding the development of her [the respondent's] relationship with her spouse" (at paragraph 3).

[29] That said, with respect, the reasons for the decision for which a judicial review is sought are not sufficient to understand its basis. Those reasons are not to be assessed in the abstract. The reasons and evidence must be compared. The decision needed to explain how the inconsistencies and contradictions were resolved, not simply that they were. The result is that this decision does not contain the indicators of reasonableness and a redetermination is therefore needed.

[30] The Court must, therefore, conclude that the application for judicial review must be allowed. The parties have agreed that there are no serious questions of general importance arising from this case. I agree. No questions are to be certified.

JUDGMENT in IMM-2197-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The matter is returned to another panel of the Immigration Appeal Division for redetermination.

3. There are no serious questions of general importance to be certified.

"Yvan Roy"
Judge

Certified true translation
This 25th day of October 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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