Federal Court  Cour fédérale

Date: 20160302

Docket: IMM-3725-15

Citation: 2016 FC 274

Montréal, Quebec, March 2, 2016

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

ALISHBA CHAUHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

UPON application for judicial review 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 July 22, 2015, rejecting the Applicant's appeal of a decision of the Immigration Division [ID], which found that the Applicant is inadmissible to Canada based on her bad faith marriage and misrepresentation of the nature of her marriage pursuant to paragraph 40(1)*(a)* of the IRPA;

AND UPON considering the Certified Tribunal Record and the oral and written representations of the parties, this Court is of the view that the application for judicial review should be dismissed for the following reasons:

[1] The Applicant is a citizen of India. In March 2009, she married Mr. Samuel, who is a Canadian citizen. The marriage, which was arranged by the Applicant's maternal uncle and Mr. Samuel's mother, took place in India. The Applicant applied for permanent residence in Canada with Mr. Samuel as her sponsor and landed as a permanent resident on September 22, 2009.

[2] Upon her arrival in Canada on September 22, 2009, the Applicant stated that she did not want to stay with Mr. Samuel and indicated that she wanted to stay with her uncle instead. She further stated that she did not want to continue with the relationship and asked for a divorce.

[3] In January 2010, the Applicant moved out of Mr. Samuel's home. During the same month, Mr. Samuel also submitted a statutory declaration to the Canadian immigration authorities, indicating that he was the victim of a fraudulent marriage by which the Applicant had gained permanent resident status in Canada.

[4] The Applicant met her current husband in June 2010 and they began cohabiting about three (3) weeks later. They were married in December 2013.

[5] On November 23, 2010, Mr. Samuel obtained a divorce from the Applicant. The ground alleged in the application was that he and the Applicant had been living separate and apart since September 22, 2009, the date of her arrival in Canada.

[6] The allegation made by Mr. Samuel was investigated by the Canada Border Services Agency and referred to the ID for an admissibility hearing. After hearing from the Applicant and Mr. Samuel, as well as the Applicant's uncle who had arranged the marriage and Mr. Samuel's church pastor, the presiding ID member found that the Applicant had entered into the marriage for the purpose of gaining permanent resident status in Canada, and had misrepresented that fact to Canadian immigration authorities. The Applicant was found to be inadmissible pursuant to paragraph 40(1)*(a)* of the IRPA and a removal order was issued against her.

[7] On appeal, the IAD concluded that the ID's decision and the removal order were both legally valid. In coming to its conclusion, the IAD relied upon the testimony of Mr. Samuel, Mr. Samuel's pastor and the Applicant's uncle before the ID, as well as letters from two (2) witnesses, which all confirmed that the Applicant had expressed her desire to leave her husband upon her arrival in Canada. The IAD also relied upon the Applicant's own admission that initially she didn't want to stay with Mr. Samuel because she was upset with him for not giving her sufficient financial support in India, but then she changed her mind. Furthermore, the IAD found that her decision not to return to India when her marriage completely broke down was indicative that her primary motive for marrying Mr. Samuel was her desire to come to Canada. Moreover, the IAD found that her failure to inform the Canadian immigration authorities of her desire for a divorce and not to reside with her sponsor, prior to and upon her landing, was a

material fact relating to a relevant matter which induced or could induce an error in the administration of the IRPA and constituted a misrepresentation under paragraph 40(1)*(a)*of the IRPA.

[8] Having found that the Applicant was inadmissible for misrepresentation, the IAD proceeded to examine whether there was sufficient humanitarian and compassionate [H&C] grounds to warrant the exercise of discretionary relief in the Applicant's circumstances. In addition to finding the Applicant "utterly not credible as a witness", the IAD found that the Applicant's conduct throughout the process, notably her lack of candour and her failure to acknowledge the true nature and seriousness of her misrepresentation, were highly aggravating factors that outweighed the evidence of hardship to the Applicant and her current husband. On the basis of these findings, the IAD concluded that there were insufficient H&C grounds to warrant special relief in light of the circumstances of the case.

[9] In her application for judicial review, the Applicant raises two (2) issues. First, she alleges that the IAD made erroneous findings of fact that were central to its decision, including: a) misstating that the Applicant "left" Mr. Samuel's home in January 2010, when actually she had intended to remain in the marriage but was kicked out by Mr. Samuel; b) misstating that the Applicant was "served" the application for divorce when really she only received an unsigned and unfiled divorce application from Mr. Samuel's brother and a copy of the Divorce Order was only delivered to her uncle's house after a considerable amount of time; and, c) concluding that there was no evidence that the Applicant had filed an affidavit in the Superior Court of Justice contesting the accuracy of the date of separation indicated in the Divorce Order. Second, she

alleges that the IAD erred in finding that the doctrine of collateral attack prevented it from revisiting the date of separation upon which the Divorce Order was granted.

[10] The Respondent submits that the alleged inaccuracies in the IAD's decision must be read in its broader context and as such they have no bearing on the IAD's determinative findings regarding the Applicant's intention when she arrived in Canada and the breakdown of her marriage.

[11] This Court has held that findings of inadmissibility due to misrepresentation pursuant to paragraph 40(1)*(a)* of the IRPA are questions of mixed fact and law which are reviewable on a standard of reasonableness (*Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 at para 19; *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at para 12). In reviewing the IAD's decision on a standard of reasonableness, I must turn my mind to whether the IAD's decision is justified, intelligible and transparent and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339 [*Khosa*]).

[12] Moreover, it is trite law that the IAD is presumed to have considered all the evidence before it (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) (QL) and that it is not the role of this Court on judicial review to re-assess and re-weigh the evidence before the IAD (*Canada (Citizenship and Immigration) v Abdo*, 2007 FCA 64 at para 13; *Khosa* at para 61). Furthermore, credibility assessments are fact-based and must be

afforded deference from this Court (*Nadasapillai v Canada (Citizenship and Immigration)*, 2015 FC 72 at para 9; *Granata v Canada (Citizenship and Immigration)*, 2013 FC 1203 at para 28; *Dunsmuir*, at para 53).

[13] With respect to the Applicant's submission that the IAD made a critical error in stating that the parties had agreed on the fact that the Applicant had stayed at Mr. Samuel's house until January 14, 2010, "when she left to live with her maternal uncle", I agree with the Respondent that the use of the word "left" is not inaccurate. Even if the Applicant was "kicked out", it does not change the accuracy of the statement that she left Mr. Samuel's house to go and live with her uncle. The IAD's statement does not suggest that the departure was voluntary. Upon reading the IAD's decision, it is my view that the IAD was simply referring to the fact that from that date onward, the Applicant and her husband were no longer living under the same roof.

[14] Even if the IAD had misconstrued the evidence on this point, I find that the use of the word "left" is immaterial when read in the broader context of the decision. The IAD's overall conclusion regarding the genuineness of the marriage and its primary purpose was not based on whether the Applicant "left" Mr. Samuel but rather on the evidence that the Applicant had expressed her wish not to reside with Mr. Samuel and demanded a divorce when she landed in Canada. Although the Applicant testified that she made the statement because she was upset with her husband for a number of reasons, the IAD rejected the Applicant's explanation on the basis that it could see no plausible reason for the Applicant to be so upset that she would come to Canada, not want to live with her husband and demand a divorce. Moreover, in reaching its conclusion, the IAD relied in particular on the testimony of the Applicant's uncle before the ID.

The Applicant's uncle confirmed that the Applicant did in fact state that she wanted a divorce upon her arrival in Canada and that he had insisted that she remain with Mr. Samuel. He also testified that between September 2009 and January 2010, the Applicant did not want to live with Mr. Samuel and that he only agreed to have the Applicant live at his house after giving the couple sufficient time to try to resolve their issues. In accepting this testimony, the IAD noted that it could find no plausible explanation as to why the Applicant's uncle would lie about this when he was the one who introduced them and financed the Applicant's trip to Canada. Accordingly, I find the Applicant's argument on this issue to be without merit.

[15] The Applicant also argued that the IAD erred in stating that she had been served with the divorce application. While the evidence as to whether she was served with the application for the divorce is unclear, the evidence is however unequivocal that in July 2010 she received a copy of the application, which clearly indicated that the date of separation was September 22, 2009, the date she arrived in Canada. The Applicant had more than enough time before the divorce was granted in November 2010 to communicate to Mr. Samuel that there was an error in the document. She did not do so. Instead, she waited until 2012 to bring a motion before the Superior Court of Justice requesting that the date of separation in the divorce application be corrected. I find the use of the word "served" to be immaterial in the circumstances of this case.

[16] The Applicant also alleges that the IAD erred in stating that there was no indication that her February 2012 affidavit in support of her motion was filed with or received by the Superior Court of Justice. I agree with the Applicant that the IAD may have been mistaken on this point since Mr. Samuel acknowledged having responded to the motion. However, I am nonetheless of

the view that this error is immaterial. This evidence simply indicates that there was a motion and an affidavit to change the date of separation. There is no indication that the Superior Court of Justice ever changed the date of separation. In fact, when the Applicant testified before the ID, she could not indicate to the ID what had transpired on the motion and Mr. Samuel also testified that he had never been convened to appear on the motion. As indicated earlier, the fact remains that the Applicant made no attempt to change the date of separation prior to the divorce being granted. Accordingly, I find the Applicant's argument to be without merit on this point.

[17] With regards to the second issue raised by the Applicant, namely that the IAD erred in finding that the doctrine of collateral attack prevented it from revisiting the date of separation upon which the Divorce Order was granted, the Applicant alleges that she is only challenging the correctness of the factual basis of the decision and is not contesting the legal force or validity of the Divorce Order. While the Respondent concedes that perhaps collateral attack is not the most appropriate doctrine to describe the IAD's lack of jurisdiction, the Applicant's demand was nonetheless an abuse of process; however, any confusion between the two (2) doctrines is immaterial given they both speak to the IAD's lack of jurisdiction to alter the findings of the Superior Court of Justice.

[18] In my view, even if the Applicant alleges that she is only challenging the correctness of the factual basis of the Divorce Order and not the decision itself, the effect of her challenge could impact the validity of the Divorce Order. In arguing that the date of separation was not September 22, 2009, but later, the statutory requirement that the spouses must have lived separate and apart for at least one (1) year would possibly not be met. The IAD may have

understood this to be the case and as a result, found that the Applicant's challenge to the date of separation constituted a collateral attack of the Divorce Order.

[19] Even if the IAD improperly referred to the doctrine of collateral attack instead of the doctrine of abuse of process, I am of the view that the IAD was clearly relying on the broader principle that the Divorce Order was final and binding and as such, it committed no reviewable error in concluding that it did not have jurisdiction to reconsider the date of separation.

[20] For the above reasons, I find the IAD's decision to be reasonable and falling within the range of possible acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, para 47).

[21] On a final note, since the Applicant did not make any submissions with respect to the IAD's conclusion that there were insufficient H&C grounds to warrant special relief, I see no need to address this issue.

[22] The parties did not propose any certified question in the present proceedings.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed and no question is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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