Federal Court  Cour fédérale

Date: 20180720

Docket: IMM-5106-17

Citation: 2018 FC 767

Ottawa, Ontario, July 20, 2018

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

AIJIAO CHEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns a spousal sponsorship application for a permanent resident visa under the family class. Aijiao Chen (the "Applicant") is a permanent resident of Canada and citizen of China. Since childhood, she has relied upon a wheelchair because she is physically disabled.

[2] The Applicant met her husband, Xingsong Chen ("Mr. Chen") in October 2009. She was in need of a personal care attendant due to her disability, and a friend referred Mr. Chen for the job. The pair eventually became romantically involved. Although the Applicant moved to Canada (having been sponsored by her son) in 2013, the couple retained contact over the phone and the Applicant travelled to China for visits. They married in December 2013 in China and the Applicant subsequently sponsored Mr. Chen for a permanent resident visa.

[3] Following an interview at the Canadian Consulate in Hong Kong, a visa officer (the "Officer") determined that the marriage was not genuine or had been entered into primarily for the purpose of gaining status. The Officer furthermore determined that Mr. Chen was inadmissible to Canada because inadequate financial arrangements had been made to support his stay in Canada.

[4] The Applicant filed an appeal of the Officer's decision on February 17, 2015. The matter was to be heard by the Immigration Appeal Division (IAD) on April 7, 2017, but was delayed to allow the Applicant to file a notice of constitutional question. Accordingly, the hearing was rescheduled for July 26, 2017. Although the Applicant sought to further postpone the hearing – in order to investigate alleged impropriety on the part of the translator who assisted with the interview in Hong Kong – the IAD proceeded with the hearing. By way of a decision (the "Decision") dated November 6, 2017, the IAD affirmed the Officer's decision that the marriage was not genuine, and therefore did not consider the question of financial inadmissibility.

[5] The Applicant now seeks judicial review of the IAD Decision. In these proceedings, the Applicant does not contest the IAD's conclusion on the genuineness of the marriage, but rather asserts that she was denied procedural fairness during the IAD hearing. The Applicant further asserts that the IAD fettered its discretion by determining that it could not allow the application on the basis of delay.

II. Facts

A. *The Applicant*

[6] The Applicant is a 56-year-old permanent resident of Canada and a citizen of China. She has been physically disabled since her early childhood, and relies upon a wheelchair for mobility. She married her first husband on November 5, 1984 and there are two children of the marriage: a son (Ming Yang) and a daughter (Aizhen Yang). The couple divorced in July 2003. The Applicant's husband remarried and his Canadian spouse sponsored him and the children to come to Canada in 2005. In turn, the Applicant's son sponsored the Applicant to become a permanent resident of Canada. She gained status and moved to Canada in March 2013.

[7] The Applicant met her current husband, Mr. Chen, in October 2009. He was hired as a nurse and housekeeper for the Applicant, preparing meals, doing laundry, taking the Applicant shopping and etc. The Applicant avers that they fell in love after about one year. After she left China in 2013, the Applicant and Mr. Chen remained in daily contact over the telephone. In September 2013, the Applicant returned to China, where she resided with Mr. Chen for about 6

months. During that time, Mr. Chen proposed marriage and they were married on December 12, 2013.

B. *Immigration Proceedings*

[8] The Applicant applied to sponsor Mr. Chen as a member of the family class in June 2014. Accordingly, the couple were interviewed at the Consulate General of Canada in Hong Kong and Macao (the "Consulate") in December 2014. Following their interviews, the Officer outlined a number of concerns: the Officer did not believe the account of how the couple met and the genesis of the relationship, and did not believe that the Applicant had the financial means to support Mr. Chen's stay in Canada.

[9] By way of a letter dated January 13, 2015, the couple was informed that the sponsorship application had been refused. The Immigration Section at the Consulate denied the application under s. 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, indicating that the marriage was entered into primarily for the purposes of immigration or is not genuine. Citing s. 39 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*), the letter further indicates that Mr. Chen is inadmissible for financial reasons because the decision-maker was not satisfied that adequate arrangements for Mr. Chen's care and support had been made to sustain his stay in Canada.

[10] The Applicant appealed the visa rejection to the IAD on February 17, 2015. The Applicant retained the services of Kazuki Takahashi to assist with the hearing in November 2015. The hearing was scheduled to proceed on April 7, 2017, but the Applicant's counsel

indicated that he wished to file a notice of constitutional question, alleging a breach of s. 11(b) of the *Charter of Rights and Freedoms (Charter)* for the delay in processing her application, as well as a breach of s. 7 and 15 on account of the Applicant's disability. Accordingly, the hearing was postponed to provide counsel time to file the constitutional question, and the hearing was rescheduled for July 26, 2017.

[11] On July 19, 2017, the Applicant's counsel sought to postpone the hearing because he had made an Access to Information and Privacy (ATIP) request, in which he sought to obtain audio or video recording of the interview which took place at the Consulate, and alleging impropriety on the part of the translator who attended the interview at the Consulate. By way of a letter dated July 21, 2017, the Minister indicated that, having contacted the Consulate, the Minister could confirm that there were no such recordings. On July 24, 2017, the Applicant's counsel responded, questioning whether the Minister's letter constituted the response to the ATIP request, and, if so, asserting that this could constitute improper interference with the ATIP office's independence. This letter further asserts that continuing with the hearing would violate the Applicant's rights under s. 7, 14, and 15 of the *Charter*.

[12] On July 25, 2017, the Applicant's counsel submitted a document for "Motions and Directions" alleging a violation of the Applicant's s. 7 and 15 *Charter* rights, requesting the case be resolved by alternative dispute resolution, requesting that the IAD order the Minister to subpoena the interpreter who attended the interview at the Consulate, order the Minister to produce all documentary evidence about the interpreter's credentials and competence, and to exclude the Global Case Management System (GCMS) notes. The Applicant's counsel submitted

a second letter on July 25, 2017, requesting that the IAD order the Minster and the Consulate to produce the video surveillance recording from the date of the Applicant's interview, and to preserve and produce all documents related to the interpreter and the interview which took place on that day.

[13] The IAD Member (the "Member") held a hearing on July 26, 2017. She held a pre-hearing conference to address the Applicant's motions, dismissing each of them orally with the exception of the request to exclude the GCMS notes, upon which she reserved her decision.

C. *The IAD Decision*

[14] The IAD dismissed the Applicant's appeal by way of a decision (the "IAD Decision") dated November 6, 2017.

(1) GCMS Notes

[15] On the matter of the GCMS notes, the IAD deemed that they should not be excluded. During the hearing, the Applicant's counsel alleged that there was improper collusion between the translator and the Officer who conducted the interview at the Consulate. In support of that allegation, the Applicant's son swore an affidavit setting out the circumstances giving rise to that suspicion, and he also testified about the matter at the hearing, in spite of the fact that he was not present at the interview in Hong Kong. The IAD was unpersuaded by the evidence of any wrongdoing at the Consulate, particularly the hearsay nature of the son's affidavit and the failure

of counsel to question the Applicant herself on those allegations during the hearing. The IAD thereby determined that the GCMS notes would remain as part of the record.

(2) Merits

[16] The IAD identifies two issues in the appeal: whether the marriage was genuine or entered into primarily for the purpose of obtaining status under *IRPA*, and whether Mr. Chen is financially inadmissible to Canada under s. 39 of *IRPA*. The IAD concludes that the marriage is not genuine and was entered into for the purposes of immigration, and therefore does not contemplate the issue of financial inadmissibility.

[17] At the outset of her reasons, the Member draws a negative credibility inference from the fact that Mr. Chen did not testify. She expresses her view that Mr. Chen should have testified to explain the contradictions that were observed by the Officer who rejected the initial application for spousal sponsorship, and to expand upon the allegations of impropriety at the Consulate. The IAD Decision then analyzes the evidence and dismisses the appeal on the following grounds: a) circumstances in which Mr. Chen was hired, b) timeline of the couple's relationship, c) marriage plans, and d) the Applicant's first husband.

(a) *Circumstances in which Mr. Chen was hired*

[18] The IAD was skeptical about the circumstances in which Mr. Chen was hired to work with the Applicant, noting the fact that he apparently was introduced to the Applicant to become a caregiver in October 2009 but worked in the construction industry until October 2010, and thus

supposedly held two jobs at the same time. The IAD further recalls the Officer's question as to why Mr. Chen left the construction industry to become a house helper, finding that his answer (that the Applicant is a "good woman") made little sense and was not credible. The Member asked why the Applicant wanted a male caregiver, to which she responded that previous female caregivers had families and other commitments, whereas Mr. Chen showed sympathy to her and felt sorry for her. The IAD rejects this explanation, finding it to be "dubious" and stating that the genesis of the couple's relationship was not credible.

(b) *Timeline of the couple's relationship*

[19] The IAD expresses concern about the lack of clarity around the genesis of the relationship. During his interview at the Consulate, Mr. Chen indicated that he fell in love with the Applicant after being her caregiver for about a year, and said that they discussed their feelings in July or August 2010. The IAD asserts that this is contrary to a written questionnaire that he completed, which states "[a]fter she went to Canada, she found she still needed me. I also found I missed her very much" (IAD Decision, para. 47). The IAD deemed that this undermined Mr. Chen's credibility and the assertion that the marriage is genuine.

[20] The IAD also finds the Applicant's evidence on this question to be contradictory to that of Mr. Chen. The IAD notes that during the Consulate interview, the Applicant asserted that there was no romantic relationship prior to her departure for Canada, which contradicts Mr. Chen's evidence that they became romantically involved in 2010. Moreover, when questioned during the hearing, the Applicant testified that she stopped paying Mr. Chen after they became romantically involved in 2011, which is before she left for Canada in 2013. The Member

concludes that “inconsistencies around this pivotal issue…indicate that the story is not credible and that their relationship did not evolve in a way the couple would have me believe” (IAD Decision, para. 48).

(c) *Marriage Plans*

[21] The IAD Decision further notes contradictions in the couple’s evidence around their plans to get married. The IAD notes that during the hearing, the Applicant said that she proposed to her husband because he treated her kindly. The Applicant subsequently changed her testimony to relay that she proposed to her husband when she came to Canada, and that Mr. Chen proposed to her before she came to Canada. On the basis of these inconsistencies, the Member finds that the proposal did not occur in the manner described, and that the relationship did not evolve in the way the couple described. The Member therefore finds both the Applicant and Mr. Chen not to be credible.

(d) *The Applicant’s First Husband*

[22] The IAD took issue with the information surrounding the death of the Applicant’s first husband. At the Consulate, the Officer asked Mr. Chen if the Applicant was divorced from her first husband at the time of his death; while he initially answered “no,” he changed his answer to “yes” when pressed. Also, while the Applicant’s former husband indicated that he divorced her in 2001, the Applicant asserted they were married until July 2003. The Member further finds that the Applicant lied with respect to her previous husband’s other relationship during her interview

at the Consulate: she first said that her first husband married another woman to help get himself and the kids to Canada, and then said that he kept a mistress without her knowledge.

III. Issue

[23] On appeal before this Court, the Applicant submits that the IAD fettered its discretion, applied the incorrect test regarding the issue of delay, and denied the Applicant procedural fairness. In its written materials, the Applicant does not appear to contest the IAD's Decision that the marriage is not genuine or was entered into primarily for the purpose of obtaining status under *IRPA.*

IV. Standard of Review

[24] The Federal Court of Appeal's most recent pronouncement appears to suggest that the standard of review on fettering discretion is reasonableness: *Stemijon Investments Ltd. v Canada (Attorney General),* 2011 FCA 299 at paras. 20-27, although the case law of this Court suggests that there is still some residual uncertainty on the matter. In the case at bar, I am prepared to accept that if the IAD fettered its discretion, it would constitute a reviewable error under either standard of review.

[25] The standard of review applicable to questions of procedural fairness is correctness, as is the question as to whether the IAD applied the incorrect legal test for delay: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12.

V. Analysis

A. *Fettered Discretion*

[26] The Applicant asserts that the IAD fettered its discretion in determining that it had no jurisdiction to allow an appeal on the basis of delay. The Applicant relies upon the Supreme Court of Canada's decision in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras. 102-106 [*Blencoe*] for the proposition that unreasonable delay is a basis upon which questions of natural justice and procedural fairness arise, notably when they prejudice a party's evidence or otherwise taint the proceedings. The Applicant further asserts that by virtue of *IRPA* s. 67(b), the IAD has jurisdiction to allow an appeal where a principle of natural justice has not been observed, and therefore fettered its discretion by determining that it had no such power.

[27] The Respondent submits that the Member did not fetter her discretion, but rather correctly determined that she did not have jurisdiction to stay the proceedings. The Respondent notes that *IRPA* s. 66(b) allows the IAD to stay a removal order, and because there is no removal order in the case at hand, the Member did not fetter her discretion.

[28] In my view, the issue of a stay is not relevant to these proceedings. Although it is true that the Applicant's former counsel requested a stay of the proceedings under s. 24(1) of the *Charter* and may have thereby somewhat confused the issue, the Applicant is not seeking a stay at this stage (nor would it be helpful in the Applicant's circumstances, either now or in the previous proceedings before the IAD). Thus, in my view, the only relevant question is whether

the IAD fettered its discretion by determining it did not have jurisdiction to allow the appeal because of the administrative delay. This question, too, is academic, because it is not what the Applicant requested before the IAD. Accordingly, I will not consider the issue any further.

B. *Test for Delay*

[29] The Applicant asserts that the IAD did not apply the correct legal test in determining whether an administrative delay amounts to a breach of natural justice or procedural fairness. Again relying upon *Blencoe*, the Applicant sets out the tripartite considerations for assessing whether an administrative delay amounts to a breach of procedural fairness: 1) the time taken compared to the inherent time requirements of the matter, 2) the causes of the delay beyond the inherent time requirements, and 3) the impact of the delay, considering prejudice in an evidentiary sense and other harms to the lives of people impacted by the delay. The Applicant asserts that this framework is absent in the IAD Decision; the IAD did not engage in any analysis regarding the time taken compared to inherent time requirements, the causes of the delay, and whether the delay amounts to an abuse of process that might compromise the fairness of the hearing.

[30] The Respondent contends that the IAD did not err in applying the test for delay. It affirms that the appropriate test is found in *Blencoe*, but defends the IAD's analysis by pointing out that much of the delay was occasioned by the Applicant's own actions, the Applicant did not request expedited processing, and did not make an application to the Federal Court to address the delay. The Respondent further submits that the IAD considered the issue of prejudice, and reasonably

determined that the Applicant had not demonstrated significant prejudice to her case as a result of the delay.

[31] I am unpersuaded by the Applicant's submissions concerning delay. First, in the proceedings before the IAD, the Applicant does not appear to have relied upon the test in *Blencoe* to argue that the delay from February 2015 to April 2017 was inordinate, and thus it is improper to challenge the IAD's alleged failure to apply that test at this stage. Second, I am of the view that the Applicant has not satisfied its burden to demonstrate how the administrative delay amounted to a breach of natural justice. In my view, no such breach occurred, and I am unable to identify any meaningful prejudice to the Applicant's case as a result of the delay.

C. *Procedural Fairness*

[32] The Applicant argues that she was precluded from testifying about how she uses the toilet, despite the fact that this was important evidence to illustrate the level of care that she requires due to her disability. The Applicant asserts that this evidence relates directly to the prejudice she experienced as a result of the delay, and she was precluded from providing it by the IAD.

[33] The Applicant further submits that the IAD erred in distinguishing the Supreme Court of Canada's decision in *R v Jordan*, 2016 SCC 27 [*Jordan*] from the case at bar by suggesting that delay in the criminal context is more serious to that of the immigration context. The Applicant argues that, like in the criminal context, memories fade over time and can prejudice an applicant

for spousal sponsorship from providing the best evidence, and that the result of a refusal can mean separation for indefinite periods of time.

[34] The Respondent argues that it was reasonable for the Member to indicate that she would not receive testimony concerning the Applicant's use of the toilet. The Respondent notes that the IAD was well aware of the Applicant's mobility issues, and reiterates that the evidence that the Applicant sought to tender did not address the issue of the alleged prejudice against her stemming from the delay. With respect to *Jordan*, the Respondent argues that there is no "presumptive ceiling" for processing an appeal, and that the concept of a ceiling is limited to criminal law matters. The Respondent relies upon the Federal Court of Appeal's decision in *Akthar v Canada (MEI)*, [1991] 3 FC 32, p. 38-39 (FCA) as illustrative about how delay is to be applied in the immigration context; that is, delay alone is an insufficient basis upon which to find a breach of natural justice. The Respondent adds that there is nothing in the Applicant's evidence to suggest that the nature of the infringement that delay has caused in her case is similar to that of a person facing criminal conviction.

[35] The IAD's actions did not interfere with the Applicant's right to a procedurally fair process. The IAD provides cogent reasons for refusing to hear the Applicant's testimony with respect to her use of the toilet. The IAD Decision squarely deals with the issue of procedural fairness, stating:

> It was readily apparent to me that the [Applicant] may have difficulties with her mobility and day to day living due to her disability. However, questions about her bathroom habits cannot possibly shed any light on the matters in issue in this appeal. It is not a breach of procedural fairness to prevent counsel from asking irrelevant and degrading questions of his client.

[IAD Decision, para. 33]

I agree with the IAD. The challenges that the Applicant faces with respect to day-to-day activities, including use of the toilet, were not in dispute. In fact, during the hearing the Member specifically asked the Minister's counsel to stipulate that the Applicant suffers great difficulty to use the washroom due to her disability, which was readily accepted by the Minister's counsel. As such, there was nothing to be gained from the Applicant's testimony on this issue that could have supported an argument that her s.15 *Charter* rights had been violated by the delay in processing her claim.

[36] While I disagree with the Member's assertion that delay in the criminal context is more serious as compared to the immigration context, I am of the view that the Supreme Court of Canada's decision in *Jordan* is limited to the criminal law context and the interpretation of s. 11(b) of the *Charter* and does not presently find application in the immigration context. As such, no breach of procedural fairness occurred here.

VI. Certification

[37] Counsel for both parties was asked if there were questions requiring certification. They each stated that there were no questions arising for certification and I concur.

VII. Conclusion

[38] This application for judicial review is dismissed. The Member neither misapplied the law with respect to the issue of delay, nor denied the Applicant procedural fairness. The decision is reasonable and does not warrant this Court's intervention.

JUDGMENT in IMM-5106-17

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

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

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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