Federal Court  Cour fédérale

Date: 20190513

Docket: IMM-5340-18

Citation: 2019 FC 668

Toronto, Ontario, May 13, 2019

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

LEE SAN TAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Tan asks the Court to set aside a decision of the Immigration Appeal Division [IAD] which determined that the doctrine of *res judicata* applied to prevent the hearing of her appeal on its merits.

[2] Ms. Tan applied to sponsor her spouse, Yao Heong Chew, to become a permanent resident of Canada in 2007. That application was refused in November 2007, because the officer

was of the opinion that Mr. Chew was not a member of the family class. That conclusion was reached because when Ms. Tan became a permanent resident of Canada, Mr. Chew had not been listed as a non-accompanying family member and was not examined. When those conditions are met, paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, expressly provides that the foreign national "shall not be considered a member of the family class."

[3] The officer's determination that Mr. Chew was a non-accompanying family member at the relevant time was based on information Mr. Chew provided that he had been "staying with her in Malaysia" and that they had lived together from August 1, 2002 to May 20, 2006, when Ms. Tan left for Canada. Based on this information, the officer concluded that Mr. Chew was Ms. Tan's common-law spouse.

[4] Ms. Tan appealed this decision to the IAD. She acted on her own behalf in this process. Despite the IAD corresponding with her, she failed to file any submissions. This failure resulted in her being served with a Notice to Appear "at no-show court" on May 28, 2008. The record indicates that "She appeared at that time and requested a further opportunity to file written submission." New timelines were established and were confirmed in writing. Ms. Tan again failed to file any submissions. As a result, and in keeping with IAD Rules, a member decided to dispose of the appeal on the basis of the documents in the file. The relevant portion of that decision dated September 3, 2008, is as follows:

> As brief background, the refusal letter indicates that the applicant advised the visa officer that he had cohabitated with the appellant between August 2002 and May 2006. The refusal letter also notes that the appellant did not declare the applicant to immigration

> authorities at the time she submitted her own previous application for permanent residence. Consequently, the visa officer concluded that the applicant was not examined in the context of his sponsor's application for permanent residence. The applicant's application was refused by reasons of the paragraph 117(9)(d) provision.
>
> The appellant has not challenged the visa officer's conclusions with respect to the applicant's non-examination in the relevant period. Based on the information made available to me in the context of this appeal, I conclude that the applicant was not examined in the relevant period and, therefore, that he is excluded from membership oi the family class. Having determined that the applicant is not a member of the family class, section 65 of the *Act* operates to disentitle this appellant from discretionary relief.

[5] Ms. Tan did not challenge this decision at the time. Counsel suggests that she did not file submissions or appear because at that time her own status was being examined to ascertain whether she should be removed for failing to disclose the relationship with Mr. Chew. Counsel's suggestion is pure speculation. There is nothing in the record that supports this was Ms. Tan's reasoning and I note that despite her status having been sent for review, this provided no impediment to her attending the IAD no-show court where she asked for an opportunity to provide submissions.

[6] In April 2013, Ms. Tan filed a second sponsorship application for Mr. Chew, and for their child who was born in April 2013. That application was refused on the same grounds as the refusal in 2008; namely that Mr. Chew is not a member of the family class. Another appeal was filed with the IAD.

[7] In correspondence filed with the IAD, it is stated that Ms. Tan and Mr. Chew were not in a common-law relationship when she made her permanent resident application. They were

staying and living together because Mr. Chew was renting accommodation from Ms. Tan's family and sharing a bedroom with her brother. They suggest that they were, at most, boyfriend and girlfriend.

[8] In light of the earlier decision of the IAD that Mr. Chew was not a member of the family class, the IAD asked for submissions on whether that issue was *res judicata*. It found that it was and that is the decision under review.

[9] The IAD found that the three conditions set out in *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 [*Danyluk*], were met. It found that the parties to the appeal under consideration and to the previous 2008 appeal were the same. It further found the issue before it - whether Mr. Chew was a member of the family class - was the same as the issue before it in 2008. Lastly, it found that the decision in 2008 was a final adjudication. It concluded that the current appeal was an attempt by Ms. Tan to improperly re-litigate the matter.

[10] Ms. Tan submits that the parties are not the same now as in 2008, and she points specifically to her son who is named in the sponsorship application, but was not even born when the IAD made the 2008 decision.

[11] I am of the view that while the birth of their son may change the members of her family, it does not change the relevant parties. Both now and in 2008, the relevant parties before the IAD, as indicated on the first page of the decision, were Ms. Tan and the Minister. If her submission were accepted, it would lead to the absurdity that she could file a new application for

Mr. Chew every time they had a child. The issue before the IAD in the decision under review is the status of Mr. Chew, and that has not been changed by the birth of their son.

[12] Ms. Tan further submits that the IAD failed to apply the "current" law when examining exceptions to the strict application of *res judicata*. She correctly points out that the IAD relied on the 1988 decision of the British Columbia Supreme Court in *Saskatoon Credit Union Ltd v Central Park Enterprises Ltd*, 47 DLR (4th) 431, 1988 CanLII 2941 (BC SC), when at paragraph 12, the IAD stated:

> A repeat appeal can only be *res judicata* if there exist no special circumstances that would bring the appeal within the exception to the doctrine. The exception of special circumstances applies where in the previous proceedings there was fraud or other misconduct that raises natural justice issues. In addition, the exception extends to decisive new evidence that could not have been discovered by exercise of reasonable diligence in the first proceeding. It also applies to changes in the law and public policy considerations. [footnote omitted]

[13] I agree with Ms. Tan that these "special circumstances" are restrictive and quite challenging to meet. In this case, there is no suggestion by her that any of them apply.

[14] Rather, she says the IAD should have examined the more recent Supreme Court of Canada statement of "special circumstances" in *Danyluk* at paragraphs 68-81, and *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 [*Penner*]. Specifically, counsel says that *Penner* makes it clear that "regard must be given not only to whether justice was served in the past, but also whether justice is served <u>in the present</u>" [emphasis in original]. Indeed, at paragraph 39 of *Penner*, the court states: "[E]ven where the prior proceedings were conducted

fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim" [emphasis added].

[15] I take from counsel's submission, that Ms. Tan accepts, as indeed she must, that the first IAD proceeding was fairly conducted.

[16] *Penner* and *Danyluk* both involve prior decisions of an administrative tribunal established for a specific purpose being used to prevent a subsequent hearing by a different and higher court established for a different purpose. Many of the factors identified in those cases consider the differences between the decision-makers. That is not the case here. Here, the prior decision was made by precisely the same tribunal and for precisely the same purpose. Accordingly, I do not accept the submission that applying *res judicata* here is a failure of justice or results in any unfairness.

[17] While it would have been preferable had the IAD specifically referenced the arguably broader *res judicata* exceptions from *Danyluk* and *Penner*, rather than referencing the decision it did, I agree with the Minister that reading the decision as a whole and being aware of the "facts" that were before the IAD, the decision it reached regarding *res judicata* was reasonable even if those broader factors had been specifically considered.

[18] In short, the finding that Mr. Chew is not a member of the family class is *res judicata*, as between Ms. Tan and the Minister.

[19] Ms. Tan proposed that the Court certify the following questions:

1. Is it erroneous to find *res judicata* when one of the parties (or a matter) in the current proceeding was not born yet when the decision was made in the prior proceeding?

2. Is it an unlawful fettering of discretion to rely on the 1988 British Columbia Supreme Court decision, rather than recent Supreme Court of Canada jurisprudence for guidance on what would constitute exceptions to the application of *res judicata*?

3. Is it procedurally unfair to rely on *res judicata* without an oral hearing, given that the exception to *res judicata* may turn on findings of credibility?

[20] The Minister submits that none of these questions are appropriate to be certified. Counsel submits, and I agree, that none disclose a matter of general importance, and that the law on *res judicata* is well defined and set out in the decisions of the Supreme Court of Canada in *Danyluk* and *Penner*. Moreover, the decision reached is dependent on the very specific and the somewhat unusual facts of this case as disclosed to the IAD prior to its 2008 decision, which is admitted to have been made in a procedurally fair manner.

[21] The last proposed question relates to a finding by the Officer who dealt with the second sponsorship application that Mr. Chew was not credible. The Officer did not accept Mr. Chew's explanation that his statements about "staying together" were a misunderstanding. It was only on the appeal of this Visa Officer's decision that the potential application of *res judicata* was identified.

[22] With respect, this question is based on a mistaken perception on the role of *res judicata* in this matter. The IAD did not need to consider the Officer's credibility findings to determine the issue of *res judicata*, precisely because of the application of *res judicata*. The factual issue of Mr. Chew and Ms. Tan "staying together" had already been determined by the IAD in 2008. It would only be if the IAD determined that *res judicata* did not apply that the IAD would then have to consider the findings of the Officer. Given that the IAD found *res judicata* applied, the Officer's findings, including those made on credibility, were irrelevant to this decision.

[23] If the earlier decision was wrong, the time to challenge it was in 2008, when Ms. Tan had every opportunity to make submissions and review the decision of which she now complains.

JUDGMENT IN IMM-5340-18

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

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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