Federal Court  Cour fédérale

Date: 20191017

Docket: IMM-2705-18

Citation: 2019 FC 1304

Ottawa, Ontario, October 17, 2019

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

HARRIET QUIKU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of the refusal of an application made by Ms. Quiku to sponsor her husband, Joseph Kwaku Oppong Peprah (Mr. Peprah) for permanent residency in Canada as her spouse. The Immigration Appeal Division (IAD) of the Immigration and Refugee Board determined that under Ghanaian matrimonial law, Mr. Peprah and Ms. Quiku were not married. As a result, Mr. Peprah did not fall within the family class in the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*).

[2] For the reasons that follow, this application is allowed and the matter is sent back for redetermination by a different member of the IAD.

I. Background Facts

[3] Ms. Quiku is a citizen of both Ghana and Canada who lives in Toronto. Mr. Peprah is a citizen of Ghana, where he currently resides. Together, they have three children aged 17, 11 and 9. Ms. Quiku also has an older child from a previous relationship.

[4] This review involves consideration of the marital history of Ms. Quiku. The IAD's interpretation and application of Ghanaian marriage laws to Ms. Quiku's marital history led to the refusal of the sponsorship application.

[5] A critical fact in this application is that, although they were separated, Ms. Quiku was married to a Canadian man when she entered into a customary law marriage with Mr. Peprah.

[6] The marital history of Ms. Quiku is as follows:

- February 25, 2001: Ms. Quiku marries Mr. Alexander Anim;
- March 13, 2002: Ms. Quiku separates from Mr. Anim;
- December 2, 2006: Ms. Quiku enters into a "customary marriage" with Mr. Peprah in Ghana;
- August 9, 2007: Ms. Quiku divorces Mr. Anim; and
- February 8, 2013: Ms. Quiku marries Mr. Peprah in a civil ceremony in Ghana.

II. Issue and Standard of Review

[7] The issue in this matter is whether the IAD's decision that Mr. Peprah is not a member of the family class is reasonable.

[8] The standard of review for a decision by the IAD determining an appeal of an application for spousal sponsorship under the *IRPA* is presumptively reasonableness, because it involves consideration of the home statute of the IAD and questions of mixed fact and law: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54 [*Dunsmuir*].

[9] In this case, the IAD was required to make a determination on the validity of a marriage made in Ghana, under foreign law. Determinations regarding the content of foreign law involve findings of fact and are reviewable on a standard of reasonableness: *Asad v Canada (Citizenship and Immigration)*, 2015 FCA 141 at paras 14 - 26.

III. **Legislation**

[10] The *Immigration and Refugee Protection Regulations*, SOR/2002-227 specifically state that if there is an existing marriage to another person at the time of the marriage of a foreign national and a sponsor, the foreign national shall not be considered a member of the spouse in Canada class:

125 (1) A foreign national shall not be considered a member of the spouse or common-law partner in Canada class [. . .] if	125 (1) Ne sont pas considérées comme appartenant à la catégorie des époux ou conjoints de fait au Canada [. . .]
(c) the foreign national is the sponsor’s spouse and	c) l’époux du répondant, si, selon le cas :
(i) the sponsor or the spouse was, at the time of their marriage, the spouse of another person,	(i) le répondant ou cet époux était, au moment de leur mariage, l’époux d’un tiers,

IV. **Marriages in Ghana**

[11] Three types of marriages are legally recognized in Ghana: marriage under the ordinance, marriage of Mohammedans, and customary law marriage. Two of these types are relevant in this matter. They are:

1. Marriage under the ordinance, which is a civil, monogamous marriage between a man and a woman; and
2. A customary law marriage which is potentially polygamous. It allows a man to marry as many women as he wishes. A woman, however, can only marry once.

V. **The IAD and Visa Officer Decisions**

[12] A visa officer refused the application of Ms. Quiku because the officer found that she was previously married and had not obtained a divorce from that person prior to her customary marriage to Mr. Peprah.

[13] Ms. Quiku argued before the IAD that as her divorce from her first husband occurred before her civil marriage to Mr. Peprah she was free to marry him. She alleged this was the case regardless of whether or not her customary marriage to Mr. Peprah was valid.

[14] The IAD however found that because Ms. Quiku was not divorced from her first husband until after her customary marriage to Mr. Peprah, she was not free to "customarily marry" him when she did. Although not stated by the IAD, this presumably was because under a customary marriage Ms. Quiku could not have more than one husband.

[15] The IAD found that the civil marriage certificate from February 2013 contained a condition. The IAD interpreted the condition as being that "for the marriage certificate to be a legal valid marriage", it was a requirement that Ms. Quiku and Mr. Peprah were "married under customary law" at the time of the civil marriage.

[16] The IAD made that finding because there was handwriting in the Marriage Certificate in the column entitled “Condition” that said “Married under Customary Law”.

[17] The IAD concluded that as no other customary marriage had been entered into by Ms. Quiku and the customary marriage in 2006 was not valid, the civil marriage was not valid because the required condition of “marriage under customary law” was not met.

VI. **The IAD Decision was Unreasonable**

[18] I have determined that the IAD decision was unreasonable for reasons set out below.

[19] The IAD began its section on the assessment of the evidence with this statement:

> The issue that I believe to be at the heart of why this application was refused is the reference to the condition outlined in the Certificate of Marriage of the February 8, 2013, civil marriage which indicates that the “Condition to be — Married under Customary Law”.

[20] I note that the column on the marriage certificate is headed “Condition”, not “Condition to be”.

[21] It was accepted by the IAD, without any evidence in the record, that the heading “Condition” in the marriage certificate meant “Requirement” or “Pre-requisite” rather than “State” or “Status”, which are two common synonyms for the word condition.

[22] The legal capacity to marry is generally a requirement for entering into a valid marriage. In Ontario and the other provinces in Canada for example, an application for a marriage licence requires the parties to state their existing marital status. The options provided in the prescribed Ontario Marriage Licence Application are: never married, widowed and divorced.

[23] The Certificate of Marriage that is in the Certified Tribunal Record indicates that it is Form C under *The Marriage Ordinance Cap. 127*. While that legislation is not in the record, the Minister did file a copy of the *Customary Marriage and Divorce (Registration) Law, 1985* PNDCL 112. That legislation stipulates, in the First Schedule, what is to be recorded in the register of marriages. For the wife, it sets out the usual requirements of name, age, date and place of marriage, as well as place of residence. It then has a field for "Condition" which is followed by a place for signatures or thumb prints for witnesses and any remarks, as well as the signature of the Registrar.

[24] The field for "Condition" with respect to the wife is set out as follows:

> Conditiona— (Spinter or Divorce)
>
> [typographical errors in the original]

[25] The corresponding field for the husband states "Other Existing Marriage".

[26] In a customary marriage, the husband may have more than one spouse, so the relevant information is whether he has any other marriage. The wife is required to be monogamous, so the relevant information is whether she is a spinster or is divorced.

[27] From the foregoing, it is clear that for customary marriages, the legislation stipulates that the word "Condition" refers to the legal status or capacity of the two people being married. There is no reason to suppose that *The Marriage Ordinance Cap. 127*, addressing civil marriages, would use the term "condition" any differently.

[28] A civil marriage certificate confirms the existence of a marriage which, by law in Ghana, is monogamous. It would be strange indeed, if it was a condition of such marriage and noted on

the face of the marriage certificate that the marriage was predicated upon the parties already being in a marriage in which the husband can be polygamous. The IAD failed to address this obvious incongruity.

[29] The IAD also placed emphasis on the fact that there was no evidence from Ms. Quiku that she registered or did not register the customary marriage. The Minister submitted that the previous legislation required that all customary marriages contracted before the commencement of the law in 1985 had to be registered and, all marriages contracted in 1985 had to be registered within three months of the marriage. Since the 1991 amendment, the law provides that either party or both parties to a customary marriage may apply in writing to register the marriage and such application may be made at any time after the marriage.

[30] I note the wording of the amendment, with my emphasis added, is that "either party or both parties to a customary marriage may apply in writing to register the marriage." The Minister did not comment upon this wording nor did the IAD. Generally speaking, the word "may" is permissive, not mandatory. While there are situations where "may" should be read as "shall", they are rare and an analysis of the legislation is required to arrive at that conclusion. No such analysis was conducted by the IAD.

VII. **Conclusion**

[31] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir* at paragraph 47.

[32] If the reasons, when read as a whole, “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”: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16.

[33] The IAD concluded that if the civil marriage certificate was to be accepted as legal then the conditions of the registration of marriage must also be satisfied. That is, the parties to the civil marriage must have already been married under customary law. The basis for that conclusion is not stated nor is it evident from the reasons of the IAD. In that respect, the decision is not transparent and it is unintelligible.

[34] The IAD conclusion also runs counter to the evidence in the legislation in the record.

[35] The failure of the IAD to acknowledge or reconcile the incompatibility of requiring a polygamous customary marriage as a condition of entering into a monogamous civil marriage also renders the decision unintelligible.

JUDGMENT in IMM-2705-18

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the Decision is set aside.

2. The matter is returned for redetermination by a different member of the IAD.

3. There is no serious question of general importance for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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